2003

Development Associates, Inc. v. Gene Peaden : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DEVELOPMENT ASSOCIATES, INC. Plaintiff/Appellant, vs. GENE PEADEN, Defendant/Appellee.	Case No. 20030032-CA

BRIEF OF THE APPELLEE

On Appeal from the Judgment of Dismissal made by the Third District Court for Salt Lake County, Judge William B. Bohling Presiding

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

JURISDICTIONAL STATEMENT

Appellee Gene Peaden (hereinafter "Peaden") does not dispute that this Court has appellate jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(j), to review the final order made by the District Court which dismissed Development Associates, Inc.'s (hereinafter "D.A.") complaint for failing to state a claim for relief on three alternative grounds.

STATEMENT OF ISSUES ON APPEAL

I. Are the arguments raised by D.A. concerning allegations that it was deprived of a fair hearing before the District Court unfounded and inconsistent with the proceeding that occurred before the District Court as reflected in the transcript of the hearing? (A copy of the transcript is included in the addendum.)

II. Did the District Court abuse its discretion in treating Peaden's motion to dismiss as a motion for summary judgment because of the Affidavit D.A. filed in opposition to Peaden's motion to dismiss?

III. Did the District Court commit reversible error by not ruling on Peaden's alternative motion for a more definite statement which became entirely moot after the District Court granted Peaden's motion to dismiss?

IV. Did the District Court error in dismissing D.A.'s complaint with prejudice on grounds that the complaint failed to state a claim for unjust enrichment and/or *quantum meruit* by alleging that Peaden was unjustly enriched through the receipt of incidental benefits which Peaden may have received when D.A. improved its own

adjacent properties even though Peaden had refused to agree to pay for such improvements before they were made?

V. Did the District Court error in dismissing D.A.'s complaint with prejudice on the alternative ground that even had the complaint alleged a claim for unjust enrichment or *quantum meruit*, D.A.'s alleged claims for relief were barred by the applicable four-year statute of limitations?

VI. Did the District Court error in dismissing D.A.'s complaint with prejudice on the second alternative ground that D.A.'s claim for equitable relief was barred by laches, unclean hands or equitable estoppel which arose when D.A. intentionally recorded its unlawful *Notice of Interest* against Peaden's property with the Salt Lake County Recorder on January 10, 1997?

STANDARD OF REVIEW

CONCLUSIONS OF LAW. This Court reviews the District Court's "legal conclusions for correctness, granting [them] no particular deference." *ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah App. 1997).

MIXED QUESTIONS OF LAW AND FACT. Where there are mixed questions of law and fact and this Court is reviewing the District Court's decision as to whether the facts come within the reach of the applicable law, this Court "review[s] legal questions for correctness, [but] ... may grant a trial court discretion in its application of the law to a given fact situation." *Covey v. Covey*, 2003 UT App. 380, ¶17, 486 Utah Adv. Rep. 11 (quoting *Jeff v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998)); *see also Jensen v. IHC Hospitals, Inc.*, 2003 UT 51, ¶57, 486 Utah Adv. Rep. 60 ("'If a case involves a mixed

question of fact and law, we afford some measure of discretion to the [trial] court's application of' law to facts.") (quoting *State v. Hansen*, 2002 UT 125, ¶ 26, 63 P.3d 650).

CONSIDERATION OF AFFIDAVIT FILED IN OPPOSITION TO A MOTION TO DISMISS. The District Court's decision to consider the Affidavit of Steven R. Young which D.A. filed in opposition to Peaden's motion to dismiss and two certified documents obtained from public records is subject to an abuse of discretion standard. *See Tucker v. State Farm Ins. Co.*, 2002 UT 34, ¶¶ 10-11, 53 P.3d 947; *See In the Matter of the General Determination of the Rights to Use of All the Water*, 1999 UT 39, ¶25, 982 P.2d 65; *Jensen*, 2003 UT 51, ¶57 ("When the issue involves whether to admit or exclude evidence, the measure of discretion is broad [and] we will not reverse a trial court's decision unless it 'was beyond the limits of reasonability.'") (quoting *State v. Hamilton*, 827 P.2d 232, 239-40 (Utah 1992)).

DETERMINATIVE AUTHORITY AND TRANSCRIPTS

The following authority and transcripts of hearings are attached as addenda hereto pursuant to UTAH R. APP. P. 24(a)(6).

Transcript of Motion Hearing, September 23, 2002

Transcript of Order Hearing, December 2, 2002

UTAH R. CIV. P. 12(b)(motion to dismiss)

RESTATEMENT OF RESTITUTION §106 (1936)(incidental benefit)

STATEMENT OF THE CASE

NATURE OF THE CASE

Peaden, a senior citizen, purchased approximately five building lots in the Foothill Development near Riverton, Utah for investment purposes. The lots were sold to Peaden as fully-developed lots. Sometime later the subdivision developer ran into financial difficulties. Thereafter, D.A. purchased approximately 400 building lots in the Foothill Development located in Riverton, Utah. Because D.A. had purchased several hundred lots it planned and desired to move forward with the development of its lots and the surrounding area. However, D.A. was unable to obtain building permits from Riverton City unless it completed certain development activities in the area. As a result, D.A. proceeded with some of the planned development of the area. At that time D.A. attempted to compel Peaden to sell his lots to D.A. but Peaden refused to sell. Peaden also refused to agree in advance to pay D.A. for its development expenses. Nevertheless, D.A. proceeded with its development activities for its own benefit.

On January 10, 1997, D.A. recorded a *Notice of Interest* asserting that it had an interest in Peaden's property as a result of alleged improvements made to various lots in the subdivision including Peaden's. (R. 28). D.A. admitted at the hearing before the District Court that it had not complied with the Mechanics' Lien Act for the filing of a *Notice of Lien* with the County Recorder. (R. 205, p. 49 ln. 23 - p. 50 ln. 12). D.A. filed a complaint for unjust enrichment and *quantum meruit* alleging that it was entitled to recover damages from Peaden as a result of the improvements D.A. had made to the development for its own benefit. (R. 1-4). Because the allegations in the complaint did

not state a claim for unjust enrichment or *quantum meruit* and because the alleged claims were outside of the applicable four-year statute of limitations, Peaden filed a motion to dismiss the complaint. (R. 5-7). In opposition to the motion, D.A. filed the affidavit of its president, Steven R. Young (the "Affidavit"). (R. 34-37). The Affidavit presented testimony which sustained the District Court's determination that the complaint failed to state a claim for relief against Peaden. Indeed, the Affidavit clarified that Peaden had never agreed to pay for any of the alleged development costs. (R. 35-36). At the hearing on Peaden's motion to dismiss the District Court granted Peaden's motion to dismiss on substantive grounds. (R. 144, 205 p. 53-56). Prior to the argument on the motion to dismiss, the parties represented to the District Court that the prior issues pertaining to the timeliness of pleadings had been resolved, that the District Court's prior minute entry ruling based on a timeliness was to be disregarded and the District Court would consider and rule upon the merits of Peaden's motion to dismiss. (R. 205, p. 7 ln. 5-p. 8 ln. 10). Both parties agreed at the hearing that they were prepared for and that the District Court could proceed with a hearing on the substantive issues filed in connection with Peaden's motion to dismiss. (*Id.*) The District Court was very careful in indicating to D.A. that the Court would continue the hearing if D.A. so desired. (R. 205, p. 7 ln. 20-24). Both parties agreed to go forward. (R. 205, p. 7 ln. 25-p. 8 ln. 3). After considering and ruling solely upon the substantive issues, the District Court dismissed D.A.'s complaint. (R. 182-89). Notwithstanding the statements and representations made by counsel immediately prior to the hearing, D.A. is now arguing that it was somehow deprived of a proper adjudication of the motion. Peaden strongly disagrees.

COURSE OF PROCEEDINGS

On March 8, 2002, D.A. filed a complaint against Peaden for unjust enrichment or *quantum meruit*. (R. 1-4). Peaden filed a motion to dismiss D.A.'s complaint for failing to state a claim for relief. (R. 5-8). Peaden's motion was supported by a memorandum of points and authorities (R. 9-23), and the three exhibits attached thereto which consisted of a copy of the complaint (R. 24-27), a certified copy of a *Notice of Interest* which D.A. had caused to be recorded against Peaden's property with the Salt Lake County Recorder on January 10, 1997, (R. 28-29), and a certified copy of a *Pre-Building Permit Report* prepared by Riverton City. (R. 30). In response, D.A. filed a memorandum in opposition to the motion to dismiss. (R. 39-48). D.A. also prepared and filed the Affidavit of Steven R. Young, who was the president of D.A. (R. 34-37). Peaden subsequently filed a reply memorandum in support of his motion to dismiss. (R. 58-70).

Thereafter, the District Court made a minute entry granting Peaden's motion to dismiss. (R. 83). The District Court made its ruling in part believing that no timely opposition had been filed. (R. 83.). In response, D.A. filed a post-judgment type motion to alter and amend the District Court's Minute Entry Decision and Order, (R. 88-106), and Peaden filed a memorandum in opposition thereto. (R. 111-22).

A hearing was held before the District Court on September 23, 2002. (R. 205). At the hearing, the District Court indicated that it was going to consider Peaden's motion to dismiss without any consideration for its prior minute entry based upon the representations by both counsel that the documents filed by D.A. should be considered as timely filed, and that Peaden's motion should be adjudicated on the merits. (R. 205, p. 5

ln. 16 - p. 6 ln. 8). While the District Court indicated that it was willing to continue the hearing to a later date, counsel for D.A. represented that D.A. was prepared and desired to go forward at that time with the hearing on Peaden's motion to dismiss. (R. 205, p. 7 ln. 20 – p. 8 ln. 3). Based upon the consent of both counsel, the District Court heard argument on Peaden's motion to dismiss. (R. 205 p. 5 - p. 8 ln. 3).

DISPOSITION IN THE DISTRICT COURT

At the conclusion of the hearing, the District Court granted Peaden's motion dismissing D.A.'s complaint. (R. 205, p. 53 - p. 56). The Order Dismissing Case sets forth three alternative grounds for dismissal. (R. 182-89). The District Court determined that D.A.'s complaint did not state a claim for unjust enrichment against Peaden based upon an alleged claim that Peaden was somehow unjustly enriched as a result of the incidental improvements or increase in value made to his property as a result of D.A.'s own development activities. (R. 186-89). In the first alternative, the District Court ordered that D.A.'s claims were also barred by the applicable four-year statute of limitations. (R. 186-89). In the second alternative, the District Court ordered that D.A.'s equitable claims were barred by laches, unclean hands, and/or estoppel because D.A. had "intentionally recorded its *Notice of Interest* with the Salt Lake County Recorder on [Peaden's] Property in January, 1997 even though [D.A.] knew, according to its representations to the [District] Court, that the improvements for which the *Notice of Interest* were recorded had not been made at that time." (R. 187-88). The District Court also determined that D.A. had admittedly not complied with Utah Mechanics Lien Act, UTAH CODE ANN. § 38-1-1 *et. seq.*, and therefore its *Notice of Interest* was not lawfully

recorded against Peaden's property. (R. 188). The District Court granted Peaden's motion to dismiss, which was converted at least in part to a motion for summary judgment when D.A. filed the Affidavit of Steven R. Young in opposition to Peaden's motion to dismiss. (R. 188).

On December 2, 2002, the District Court held a hearing on Peaden's proposed order granting his motion to dismiss and D.A.'s opposition thereto. (R. 206). After hearing the argument of counsel, the District Court made and entered its Order Dismissing Case (R. 182-190). On December 24, 2002, D.A. filed its Notice of Appeal. (R. 193). D.A.'s appellate brief does not cite to either of the hearing transcripts held before the District Court and many of the statements made by D.A. are not supported by and are inconsistent with those hearing transcripts.

STATEMENT OF FACTS

1. D.A. filed its complaint for unjust enrichment and *quantum meruit* against Peaden on March 8, 2002. (R. 1-4). The complaint alleges in relevant part as follows:

> [3] Plaintiff is and has been the owner of numerous residential lots in The Foothills Plats "B" and "C" Subdivisions located at approximately 13800 South and 4800 West in Salt Lake County which were unimproved at the time they were acquired, having no approved roads, curb & gutter, and no connections to water, sewer, power, fuel and telephone systems, and for which it was impossible to obtain building permits for the construction of homes thereon.
>
> [4] Defendant was and is the owner of Lots 320, 322 and 334, The Foothills Plat "B" Subdivision, and Lots 379, 380 and 555, The Foothills Plat "C" subdivision, which were similarly unimproved and for which it was impossible for defendant to obtain building permits for the construction of homes thereon.

[5] In order to obtain building permits on its lots, plaintiff was required by Salt Lake County and later Riverton City to install and complete all subdivision improvements, not just for the lots owned by it, but for all lots located within The Foothills Plats "B" and "C" Subdivisions.

[6] Before proceeding to install and complete the subdivision improvements, plaintiff contacted defendant and made defendant aware of the requirement to install and complete all improvements in the entire subdivisions and requested defendant to agree to reimburse plaintiff for his share of the costs of such improvements prorated to the lots owned by him if plaintiff installed and completed such improvements so that defendant could obtain building permits for his lots.

[7] Defendant acknowledged the need to install such improvements and that such improvements would benefit him and increase the value of the lots owned by him and encouraged and requested plaintiff to proceed with the installation of such improvements.

[8] Plaintiff thereafter completed all such improvements as required by Salt Lake County and later Riverton City for the benefit of all lots in The Foothills Plats "B" and "C" Subdivisions at a total cost of $2,381,302 for Plat "B" and $3,134,044 for Plat "C". These amounts, prorated to the 159 lots in Plat "B", equals $14,977.00 per lot in Plat "B", and to the 200 lots in Plat "C", equals $15,670.22. Defendant's prorata share of those costs for his six lots is $91,941.66.

(R. 1-4).

2. On or about January 10, 1997 (which was more than four years before D.A.'s complaint was filed), D.A. recorded a formal *Notice of Interest* with the Salt Lake County Recorder as entry number 6546371 at Book 7575, Page 0892. A certified copy of the *Notice of Interest* was considered by the District Court. (R. 28).

3. The *Notice of Interest* asserted that D.A. was claiming an undefined interest in a large quantity of lots in Foothills Subdivision, Plats A, B and C located in Salt Lake County, Utah. (R. 28). The *Notice of Interest* provides in relevant part that "[t]he undersigned, Development Associates, Inc., hereby claims and asserts an interest in

subject property pursuant to their improvements and developments which benefit the following described property:" (R. 28).

4. D.A.'s recorded *Notice of Interest* was recorded against all of Peaden's five lots. (R. 28). Peaden owned lots 320, 322, and 334 of the Foothills Plat "B" according to the official plat thereof, as recorded in the office of the Salt Lake County Recorder, and lots 379 and 555 of the Foothills - Plat C, according to the official plat thereof, as recorded in the office of the Salt Lake County Recorder ("the Property") (R. 183-84). After the *Notice of Interest* was recorded by D.A. against Peaden's Property, D.A. used the unlawful *Notice of Interest* in an effort to compel Peaden to pay money to D.A. before removing its unlawful cloud from Peaden's Property.

5. D.A. represented to the District Court at the September 23, 2002 hearing that the *Notice of Interest* recorded against Peaden's Property on January 10, 1997, was recorded by D.A. before the improvements to plats B and C of the sub-division, which include Peaden's Property, were made. (R. 205, p. 36 ln. 6-10).

6. D.A. owned approximately 400 of the 556 lots in the Foothill Development, Plats A, B and C before D.A. made its improvements to the surrounding area. (R. 184).

7. D.A.'s president, Steven R. Young, stated in his sworn affidavit filed with the District Court that "[b]ecause the lots owned by others were interspersed among the lots acquired by D.A., it was impossible to install the improvements to D.A.'s lots without also installing the improvements to all lots." (R. 35, 184).

8. D.A. also represented to the District Court at hearing, and the Affidavit of Mr. Young confirms, that the improvements made by D.A. were made because Riverton

City required D.A. to make those improvements in connection with its continued development activities, and that D.A. was unable to obtain building permits from Riverton City to construct upon its lots unless most of the improvements were made. (R. 35-36, 205 p. 22 ln. 12-21).

9. D.A.'s president Steven R. Young also testifies in his Affidavit that Peaden did not agree or represent to D.A. that he would pay for the improvements to the development made or to be made by D.A. (R. 35-36).

10. After the briefing had been completed on Peaden's motion to dismiss, Peaden filed a Notice to Submit for Decision on June 14, 2002, in compliance with the *Utah Rules of Judicial Administration*. (R. 80-82).

11. On June 25, 2002, D.A. filed its Memorandum in Opposition to Peaden's Motion for More Definite Statement. (R. 85-87).

12. On June 27, 2002, the District Court entered its Minute Entry Decision and Order, dated June 26, 2002, which stated:

> Before the Court is Notice to Submit Defendant's Motion to Dismiss dated April 8, 2002 and Defendant's Alternative Motion for More Definite Statement filed on May 30, 2002, and submitted on its June 14, 2002 Notice to Submit for Decision.
>
> Having reviewed all pertinent pleadings and having noted no timely opposition being filed, AND GOOD CAUSE APPEARING, the Motion to Dismiss is granted. This constitutes the Order of the Court.

(R. 83-84).

13. On July 7, 2002, D.A. filed a Motion to Amend Findings, For New Trial, To Alter or Amend Judgment and for Relief from Judgment (R. 88-89), with supporting memorandum (R. 90-100) and affidavit (R. 101-04).

14. On July 23, 2002, Peaden filed his Memorandum in Opposition to Plaintiff's Motion to Amend Findings, For New Trial, To Alter or Amend Judgment and for Relief From Judgment. (R. 111-22).

15. On July 25, 2002, D.A. filed its Reply Memorandum in Support of Motion to Amend Findings, For New Trial, To Alter or Amend Judgment and For Relief from Judgment (R. 123-26).

16. A hearing was held before the District Court on September 23, 2002. (R. 136, 205). At that hearing Peaden's counsel and D.A.'s counsel acknowledged that all pleadings pertaining to Peaden's motion to dismiss had been timely filed and that the District Court should hear oral argument on Peaden's motion to dismiss based solely upon the substantive issues. (R. 205, p. 5-6).

17. The District Court indicated that if D.A.'s counsel wanted to continue the hearing that the District Court would continue the hearing. (R. 205, p. 6 ln. 14-17). D.A.'s counsel responded that he could "go to the merits of the motion [.]" (R. 205, p. 7 ln. 25 - p. 8 ln. 3).

18. D.A.'s counsel further represented to the District Court that D.A. would have previously removed its *Notice of Interest* against Peaden's Property had such request been made pursuant to the wrongful lien statute because the improvements had

not been made to numerous lots at the time the *Notice of Interest* was recorded with the Salt Lake County Recorder. (R. 205, p. 49 ln. 23 – p. 50 ln. 8).

19. In addition to the foregoing, a certified copy of Riverton City's *Pre-Building Permit Report* reflects that all curb, gutter, fire apparatus, road base and/or asphalt were installed before November 11, 1997 and reflects that many of the improvements to Foothills plat B were made before the end of 1997. (R. 30).

20. D.A.'s complaint did not allege that Peaden had made any payment to D.A. for any of the alleged improvements made by D.A. to the development. (R. 1-4).

21. The District Court considered the sworn Affidavit of Steven R. Young and other extraneous materials, and therefore, Peaden's motion was considered by the Court as a motion for summary judgment. (R. 205, p. 51). The District Court also determined that even without the consideration of the Affidavit and other extraneous materials, there are grounds which would sustain dismissal of all or part of D.A.'s complaint based upon the uncontested documents from the public record which were attached as exhibits to Peaden's supporting memorandum. (R. 205, p. 51-56).

22. The District Court made an order dismissing D.A.'s complaint against Peaden on several alternative grounds for failing to state a claim for relief under Utah law. (R. 182-89).

23. On October 31, 2003 D.A. filed its brief before this court.

24. D.A.'s brief makes spurious statements about the manner in which Judge Bohling addressed and adjudicated the pending motions before the District Court.

25. Many, if not most, of the procedural statements and challenges made by D.A. are directly inconsistent with the actual events which occurred at the hearing as reflected in the hearing transcripts, complete copies of which are included in the addendum hereto.

SUMMARY OF ARGUMENT

I. D.A.'s procedural arguments are unfounded and inconsistent with the record as reflected in the transcripts of hearing held before the District Court, which Peaden has obtained and attached as part of the addenda hereto. The District Court conducted a full and fair hearing on Peaden's motion to dismiss on September 23, 2002. D.A.'s attorney was present at the hearing and agreed that the hearing could proceed at that time on the merits of Peaden's motion to dismiss. This is true even though the District Court expressly indicated twice that it would reschedule the hearing if D.A. so desired.

II. D.A.'s argument that the District Court committed reversible error in adjudicating Peaden's motion to dismiss is groundless. The District Court received and considered Peaden's motion to dismiss and the documents filed by D.A. in opposition thereto. The documents were considered and discussed by the District Court and counsel at length at the September 23, 2002 hearing before the District Court. In short, the District Court held a full and fair hearing on Peaden's motion to dismiss.

III. The District Court made its decision on the merits of the substantive issues which were presented to it in the moving papers. The District Court gave no consideration to its earlier determination and ruling that D.A.'s pleadings may not have

been timely filed. Counsel for both parties agreed at the September 23, 2002 hearing that the District Court's prior minute entry would be disregarded and that the District Court should proceed with a full hearing on the merits of Peaden's motion to dismiss without any consideration as to the timeliness of the pleadings.

IV. The District Court properly treated Peaden's motion to dismiss as a motion for summary judgment because the District Court considered extraneous materials including the Affidavit of Steven R. Young which D.A. filed in opposition to Peaden's motion to dismiss, and the certified copy of D.A.'s own *Notice of Interest* and the certified copy of the *Riverton Pre-Building Report* received from public records. D.A.'s argument that it was improper for the District Court to consider the Affidavit of Steven R. Young, which was filed by the D.A. in an effort to oppose Peaden's motion to dismiss, is unfounded. The District Court did not abuse its discretion in considering the Affidavit of Steven R. Young and the two certified public records when it granted Peaden's motion to dismiss.

V. The District Court properly dismissed D.A.'s complaint for failing to state a claim for relief on three independent or mutually exclusive grounds.

1. The complaint did not state a claim for relief for unjust enrichment under Utah law The *Restatement of Restitution* § 106 provides that "[a] person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution." Based upon the foregoing, the District Court concluded that D.A. failed to state a claim for unjust enrichment against Peaden under Utah

law. The indirect benefits which Peaden received from D.A.'s own work were merely incidental benefits, which occurred when D.A. undertook to make improvements to the development for its own business purposes.

2. The alleged claims were barred by the statute of limitations. Even if the complaint stated a claim for relief for unjust enrichment, quantum meruit and/or an implied in fact contract, the four-year statute of limitations for any such claim expired pursuant to UTAH CODE ANN. § 78-12-25. The facts are undisputed that Peaden never made any payment to D.A., and therefore the statute of limitations would have begun to run when D.A. first had a claim for relief that could have been alleged against Peaden for the improvements. Such time should have been no later than the date upon which D.A. filed its *Notice of Interest* on the public records of Salt Lake County, and in no event later than the date when the improvements were later made in 1997.

3. Even if the complaint stated a claim for unjust or an implied in fact contract and the claims were not barred by the applicable statute of limitations, D.A. is not entitled to a claim in equity against Peaden because of its unclean hands. This is based upon the undisputed fact that D.A. intentionally recorded its *Notice of Interest* with the Salt Lake County Recorder on Peaden's Property in January 1997 even though D.A. knew, according to its representations to the District Court, that the improvements for which the *Notice of Interest* were recorded had not been made at the time the *Notice of Interest* was recorded.

VI. Utah law does not allow for the filing of a notice of interest against another's property for alleged incidental improvements made to or alleged increases in value conferred upon the neighboring property. The District Court accurately concluded that the proper method for filing a lien against another's property for improvements made thereto should be made pursuant to the procedures provided for in *Utah Mechanics Lien Act*, UTAH CODE ANN. § 38-1-1 *et seq.* The District Court concluded and D.A. admitted Court at hearing that it had not complied with the Act and that it was asserting no claim thereunder.

VII. D.A.'s proposed amended complaint, which alleged only two additional sentences, also failed to state a claim for relief for the same reasons set forth in the District Court's Order Dismissing Case.

ARGUMENT

POINT I

THE DISTRICT COURT CONDUCTED A FULL AND FAIR HEARING ON PEADEN'S MOTION TO DISMISS

The District Court handled the proceedings below fairly and in accordance with the *Utah Rules of Civil Procedure* and the *Utah Rules of Judicial Administration.* D.A.'s accusations of the District Court's bias and disingenuous statements are groundless and stand in stark contrast to how the District Court actually handled the matter as reflected in the September 23, 2003 hearing transcript.

The District Court had originally granted Peaden's motion to dismiss D.A.'s complaint on June 26, 2002, for lack of what it believed was a timely response. Once the

timeliness issue was resolved by both counsel at the September 23, 2003 hearing, the District Court was clear that it was going to conduct a full hearing on the merits of Peaden's motion to dismiss. (R. 205, p. 5 ln. 18 - p. 6 ln. 8). D.A. consented to that procedure. Moreover, the District Court allowed D.A. the opportunity to continue the hearing on Peaden's motion to dismiss to a later date if D.A.'s counsel so desired. (R. 205, p. 6 ln. 14-17). The District Court's discussion with D.A.'s counsel was as follows:

> THE COURT: It would. And if you're prepared to proceed on the merits, the Court is as well. On the other hand, if you – if you are unprepared and just want to set this again, it's up to you, Mr. Marsh.
>
> MR. MARSH: On the merits, are you speaking of the merits on our Motion to Dismiss?
>
> THE COURT: Yes.
>
> MR. MARSH: On their Motion to Dismiss?
>
> THE COURT: Yes.
>
> MR. MARSH: That was not noticed for today, and I did not submit courtesy copies of those documents to the Court, nor did I actually prepare for that motion, I was simply prepared to address our motion to set that aside.
>
> THE COURT: All right. I don't even think you're opposing that; are you, Counsel?
>
> MR. CALL: We had opposed it, and we did submit courtesy copies on the merits, and I – I – I do think that this was – the substance of the issues were addressed in the memorandum in opposition to Motion to Vacate.
>
> We addressed – We stated in our opposition to his Motion to Vacate that we weren't objecting to any of the timeliness issues, but that we address specifically the merits of the Court's ruling.
>
> So I guess it would be my position that the merits are before the Court today, because that was – the only response that we made to his

motion was we agreed everything is timely, but we – we agreed that the Court can look at the merits and that there's no basis for a claim.

THE COURT: Well, is it – there has been this issue, and frankly, I wanted to recognize that I understand Mr. Marsh's position here, and if you would be more comfortable rescheduling, fine, if you want to go to the merits, I'm prepared and I think Counsel is.

MR. MARSH: Well, I believe I can go to the merits of the motion, in which case that would be Mr. Call's motion, and he should address it first I suppose.

MR. CALL: All right.

THE COURT: That's fine. But, again it's really your decision, Mr. Marsh.

MR. MARSH: Well, I appreciate that, and does that clarify things for me, and it means I have merits to discuss and not – not the timeliness issue.

THE COURT: All right.

(R. 205, p. 5 ln. 18 – p. 8 ln. 10) (emphasis added).

There was nothing irregular in the foregoing proceedings that could warrant a reversal of the District Court's ruling. D.A. had a full and complete opportunity for a hearing on the merits of its case. *See Heathman v. Fabian & Clendenin*, 377 P.2d 189, 190 (Utah 1962) ("The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merit of every case."). D.A.'s counsel was also given the opportunity to reschedule the September 23, 2002 hearing if he chose. Instead, D.A. chose to proceed and argue Peaden's motion to dismiss on the merits at that time. [1]

[1] D.A. also complains that the District Court erred in not holding a hearing on Peaden's motion to dismiss prior to the District Court's minute entry. The argument is moot. The

POINT II

THE DISTRICT COURT'S DECISION WAS BASED UPON THE MERITS OF THE CASE

Peaden strongly disputes D.A.'s repeated argument that the District Court made its decision based on the fact that D.A.'s memorandum in opposition to Peaden's alternative motion had not been filed. This was unequivocally clarified at the September 23, 2002 hearing as follows:

> MR. MARSH: On June 26th the Court signed a minute entry decision and order which states, before the Court is Notice to Submit Defendant's Motion to Dismiss dated April 8th, 2002 and Defendant's alternative Motion for Definite Statement filed May 30, 2002 and submitted on its June 14, 2002 Notice to Submit for Decision.
>
> Having reviewed all pertinent pleadings and having no timely opposition being filed and good files appearing, the Motion to Dismiss is granted. This constitutes the order of the Court.
>
> THE COURT: Counsel, just so we can get right to the heart of where we're at today, I see this as a motion on the merits.
>
> I'm not going to hold you to the problem, that, as a matter of fact, there – there seem to have been other incidences where someone is late, and I'll get – I'll get submitted to me on no response an opportunity to rule on it, and simply do that.

District Court and opposing counsel consulted and agreed that the District Court's default type minute entry would be disregarded and that the District Court would rule on the merits of Peaden's motion to dismiss without consideration of any timeliness issues or the District Court's prior minute entry. The District Court never ruled on Peaden's alternative motion because it became moot when the District Court granted Peaden's motion to dismiss. Accordingly, the District Court's failure to consider D.A.'s memo in opposition to Peaden's alternative motion is inconsequential and irrelevant. Furthermore, this defect, if there was one, was corrected when the District Court held a hearing on September 23, 2002.

But if it turns out there's – that there are a couple of days delay and everybody has filed their items, I routinely just vacate that and hear the matter on the merits. And so that's where we're at today.

MR. MARSH: Okay. I'm –

THE COURT: I'm not going to hold you to the fact that you were a couple days late, it certainly isn't something that I think the other side is seeking to take advantage of. I'm willing to just hear this matter on its merits.

(R. 205, p. 5 ln. 6 - p. 6 ln. 8) (emphasis added). The District Court did hear Peaden's motion solely on the merits, and D.A.'s argument to the contrary is unfounded.

POINT III

THE DISTRICT COURT CONSIDERED D.A.'S OPPOSITION MEMORANDUM AND THE AFFIDAVIT OF STEVEN R. YOUNG

There is no merit to the argument that the District Court did not review or consider D.A.'s opposition papers. The hearing transcript (attached) reflects that the District Court read the opposing papers and the Affidavit of Steven R. Young. In addition the Notice to Submit reflects D.A.'s opposition memorandum and Affidavit of Steven R. Young as documents filed in opposition to Peaden's motion to dismiss. The Notice to Submit provides in part:

> Pursuant to Rule 4-501(1)(D) of the *Utah Rules of Judicial Administration*, Defendant Gene Peaden, by and through his counsel, Steven W. Call of Ray, Quinney & Nebeker, hereby requests that Peaden's *Motion to Dismiss,* filed on April 8, 2002 and Peaden's *Alternative Motion for More Definite Statement* filed on May 30, 2002 be submitted to the Court for decision. Oral argument has been requested by one or more of the parties. The following pleadings or documents have been filed with the Court and are relevant to the pending motions:
>
> Defendant Gene Peaden's Court Documents:

1. Peaden Peaden's Motion to Dismiss;
2. Memorandum in Support of Peaden's Motion to Dismiss;
3. Reply Memorandum in Support of Peaden's Motion to Dismiss;
4. Peaden's Alternative Motion for More Definite Statement; and
5. Memorandum in Opposition to D.A.'s Motion for Leave to File Amended Complaint and in Support of Peaden's Alternative Motion for More Definite Statement.

Plaintiff Development Associates, Inc.'s Court Documents:

1. **Memorandum in Opposition to Peaden's Motion to Dismiss;**
2. **Affidavit of Steven R. Young in Opposition to Motion to Dismiss; and**
3. Motion for Leave to File Amend Complaint.

(R. 80-81) (emphasis added).

The foregoing Notice to Submit indicates that the District Court was aware of and did in fact consider D.A.'s opposition memorandum and the Affidavit of Steven R. Young filed in opposition to Peaden's motion to dismiss.[2]

1. THERE WAS NO IRREGULARITY IN THE PROCEEDINGS BEFORE THE DISTRICT COURT.

The opposition memorandum and Affidavit of Steven R. Young, which were filed in opposition to Peaden's motion to dismiss, were served on April 25, 2002. On May 30, 2002, Peaden served a reply memorandum in response thereto and in support of his motion to dismiss. The notice to submit was filed with the District Court on or about June 14, 2002. The District Court's original minute entry was not made until June 26,

[2] Again, the only pleading that the District Court may not have considered was D.A.'s opposition memorandum to Peaden's alternative motion for more definite statement. However, the alternative motion was not ruled upon by the District Court because the District Court granted Peaden's motion to dismiss, thereby making Peaden's alternative motion for a more definite statement moot.

2002 which was 12 days after Peaden's notice to submit was made. Peaden's motion to dismiss had been fully briefed by both parties at the time the District Court made its initial ruling. Thus, there was simply no irregularity in connection with the briefing before the District Court.

2. THERE WAS NO SURPRISE.

The issue before the District Court was Peaden's motion to dismiss. The District Court did not rule on Peaden's alternative motion for a more definite statement. Instead the District Court granted Peaden's motion to dismiss. Because the motion to dismiss was granted, the District Court did not reach or address Peaden's alternative motion for a more definite statement. It is illogical for D.A. to suggest that because the District Court did not consider an untimely pleading in connection with Peaden's alternative motion for a more definite statement, that the District Court's ruling on Peaden's motion to dismiss was somehow defective. The argument is simply a red herring which seeks to create a basis for alteration or amendment when no other legal or factual basis supports such.

POINT IV

THE DISTRICT COURT'S RULING IS SUPPORTED BY THE RECORD

The District Court's ruling is fully supported by the record.[3] D.A.'s president, Steven R. Young, submitted a sworn affidavit in opposition to Peaden's motion to dismiss, but the facts set forth in his Affidavit sustain the District Court's ruling

[3] It is inaccurate for D.A. to suggest that a motion to dismiss must be supported by an affidavit. Indeed, such is not the law in Utah. *See Utah R. Civ. P.* 12(b)(6).

dismissing D.A.'s complaint. In addition to the Affidavit, the *Notice of Interest* which D.A. prepared and recorded with the Salt Lake County Recorder was attached as Peaden's Exhibit B. (R. 28). The *Notice of Interest* reflects that D.A. was claiming an interest in a large quantity of lots in Foothills Subdivision, Plats A, B and C located in Salt Lake County, Utah. The *Notice of Interest* provides in relevant part that "[t]he undersigned, Development Associates, Inc., hereby claims and asserts an interest in subject property pursuant to their improvements and developments which benefit the following described property:" (R. 28). In its opposition memorandum to Peaden's motion, D.A. did not dispute the facts as set forth in relevant portions of Peaden's statement of relevant facts, nor did it dispute the authenticity of the two certified copies of D.A.'s own *Notice of Interest* and the *Pre-Building Permit Report* presented to the District Court. Riverton City's *Pre-Building Permit Report*, which was submitted as Exhibit C, reflects that all curb, gutter, fire apparatus, road base and/or asphalt were installed before November 11, 1997. (R. 30).

It is simply inaccurate for D.A. to argue that there is no evidence to sustain the District Court's dismissal of the case. The dismissal was based upon the allegations in the complaint, the Affidavit of Steven R. Young (which D.A. submitted), the certified copy of D.A.'s *Notice of Interest* and the certified copy of the *Pre-Building Permit Report*, the representations set forth in the pleadings and the representations made by D.A.'s counsel at the September 23, 2002, hearing. In sum, the District Court's ruling is fully supported by the record.

POINT V

D.A.'S COMPLAINT FAILED TO STATE A CLAIM FOR UNJUST ENRICHMENT

D.A.'s complaint failed to state a claim for unjust enrichment or *quantum meruit* under Utah law. The RESTATEMENT OF RESTITUTION §1 provides that a person who has been unjustly enriched at the expense of another is required to make restitution to the other. The Utah Supreme Court has adopted this doctrine. *See Harline v. Daines*, 567 P.2d 1120 (Utah 1977). Unjust enrichment may be an appropriate remedy if property or services are conferred upon one person by another, the recipient appreciates or has knowledge of such property or services, the person receiving the property or services accepts such benefit and it would be "inequitable" for the person receiving the property or services to keep the same without being required to pay therefor. *See Desert Miriah, Inc. v. B&L Auto, Inc.*, 2000 UT 83, 12 P.3d 580; *Berrett v. Stevens,* 690 P.2d 553, 557 (Utah 1984); *See L & A Drywall v. Whitmore Constr. Co.*, 608 P.2d 626, 630 (Utah 1980).

The doctrine of unjust enrichment does not apply anytime the benefits are performed by the plaintiff for its own advantage. *See Baugh v. Darley*, 184 P.2d 335, 337 (Utah 1947). The Restatement of Restitution explains the law as follows:

> **§ 106. Incidental Benefit to Another from Performance of One's Duty or Protection of One's Things.**
>
> **A person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.**

Illustrations:

> 1. A, the owner of land on a river bank, reasonably fearing immediate inundation, requests his neighbor, B, to join him in building a dike which will preserve the land of both. B refuses. A builds a dike which saves both pieces of land from being flooded. A is not entitled to contribution from B.
>
> 2. A and B are adjoining mine owners whose mines have been flooded by seepage from a near-by swamp. A requests B to join him in the draining of the swamp. B refuses. A drains the swamp, thereby drying both mines. He is not entitled to contribution from B.
>
> 3. Same facts as in Illustration 2, except that C had contracted to keep water out of A's mine, and he drains the swamp in the performance of his duty to A. C is not entitled to contribution from B.

RESTATEMENT OF RESTITUTION § 106 (attached).

The *Utah Remedies Guide* also explains the law that a plaintiff is precluded from recovering for services performed or benefits furnished for the plaintiff's own advantage.

> However, unjust enrichment does not apply anytime someone has benefited to another's detriment. In particular, the courts are not inclined to provide restitution for benefits "officiously or gratuitously furnished" or "services performed by the plaintiff for his own advantage".

D.N. Zillman, *Utah Remedies Guide*, Restitution, §II at 403 (1985 ed.).

1. PEADEN HAS NOT RETAINED MONEY OR BENEFITS WHICH BELONG TO ANOTHER

There is nothing alleged in the complaint that suggests that Peaden is retaining any money or benefits which belong to D.A.. Moreover, the complaint specifies that the improvements were made by D.A. so that D.A. could promptly obtain building permits from Riverton City to build on its own properties. (R. 2). A party which makes development type improvements for its own purpose is not entitled to recover from others for the expense of such improvements.

The law was explained in *Major-Blakeney Corp.*, 263 P.2d 655 (Cal. Dist. Ct. App. 1954), where the court addressed the issue of unjust enrichment in a real estate development case and stated:

> Furthermore, there is another aspect of this matter, which is of extreme significance in the context here present. The evidence and its reasonable inferences demonstrate that the **improvements were undertaken as a part of plaintiff's own building program, that they were initiated without reference to any agreement with defendant's concerning the properties here in dispute, that defendants at no time remotely suggested they would pay for or contribute to these improvements made adjacent to or abutting other properties they chanced to own. The whole situation negatives the idea that defendants were expected to participate financially, and any benefit that could possibly have flowed to defendants was incidental to plans and obligations to which plaintiff alone had committed itself. The general rule applicable, absent other equities, is that a party is not entitled to reimbursement for improvements voluntarily made to another's land in the absence of an express or implied contract to pay**. *Callnon v. Callnon*, 7 Cal.App.2d 676, 680, 46 P.2d 988; *Titus v. Poland Coal Co.*, 275 Pa. 431, 119 A. 540; *Meeker v. Oszust*, 307 Mass. 366, 30 N.E.2d 246; *Dudzick v. Lewis*, 175 Tenn. 246, 133 S.W.2d 496. A related principle, particularly applicable to the instant case, is adopted by the Restatement of Restitution, sec. 106, in the following language: **'A person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.' The courts of many jurisdictions support this proposition**. *Raynor v. Drew*, 72 Cal. 307, 13 P. 866; *United States v. Pac. R. Co.*, 120 U.S. 227, 7 S.Ct. 490, 30 L.Ed. 634; *Wadleigh v. Katahdin Pulp & Paper Co.*, 116 Me. 107, 100 A. 150; *Stern v. Haas*, 54 N.D. 346, 209 N.W. 784. **A property owner who conceivably acquires some incidental benefit from an adjoining landowner's improvements made pursuant to the latter's private development plans is not required to account for the benefits so received.**

Major-Blakeney Corp., 263 P.2d at 664 (emphasis added).

The Utah Supreme Court also recognized the foregoing doctrine in *Berrett v. Stevens,* 690 P.2d 553, (Utah 1984) wherein the Court stated:

> There is little doubt that plaintiffs did receive some benefit from defendants' action. However, the mere fact that a person benefits another is not by itself sufficient to require the other to make restitution. **The value of the services performed by a person for his own advantage and from which another benefits incidentally are not recoverable.**

690 P.2d at 558 (emphasis added); *accord Baugh v. Darley,* 112 Utah 1, 184 P.2d 335 (1947).

The facts in the instant case are comparable to those in *Major-Blakeney Corp.* D.A. owned approximately 400 lots in the Foothills Subdivision which it obtained from the financially troubled developer. D.A. made improvements to the area in an effort to improve and develop its own lots for sale. Peaden was not involved in that improvement process, nor was he requested to give approval or make decisions in connection with the improvements undertaken by D.A. Thus, any benefit conferred upon Peaden's five lots was merely incidental to the improvements which the D.A. made for its own benefit. As such, D.A. may not recover against Peaden for any such alleged incidental benefits conferred upon Peaden.

2. GENE PEADEN DID NOT REQUEST THAT THE IMPROVEMENTS BE MADE TO HIS PROPERTIES

Sometime before the alleged improvements to the overall development were made in 1997, D.A.'s agent, Milt Shipp, contacted Peaden and requested that he sell his property to D.A. for approximately $3,000 a lot. Peaden indicated that he was not interested in selling his lots for that price. Thereafter, D.A.'s agent made statements that D.A. owned a great many lots in the development and that it was planning to make improvements to the development, and that D.A. may be seeking Peaden's involvement in the development

process. However, Peaden did not request that the improvements be made and at no time did D.A. get Peaden involved in connection with the improvements made by D.A.

3. PEADEN DID NOT AGREE TO PAY FOR GENERAL IMPROVEMENTS WHICH D.A. WANTED TO MAKE TO THE DEVELOPMENT

The facts are undisputed that Peaden did not agree to pay for any of the alleged improvements made by D.A. Indeed, D.A.'s president, Steven R. Young, testifies in his Affidavit that Peaden did not agree to pay for the general improvements made by the D.A.

> All of the other owners, either before or after the improvements were completed, acknowledged the benefit to them of the improvements and agreed either to sell their lots or to participate in the costs on a prorata basis **except for the owners of eight lots, including those owned by Peaden Gene Peaden**.

(R. 35-36) (emphasis added). Clearly, Peaden did not agree to pay D.A. for its development improvements.

4. PEADEN HAS NOT RETAINED MONEY OR BENEFITS WHICH BELONG TO D.A.

Peaden has not retained any money or benefits which belong to D.A. The benefits were performed by D.A. for its own business purposes. Indeed, D.A.'s president, Steven R. Young, testifies in his Affidavit that:

> Because the lots owned by others were interspersed among the lots acquired by us, it was impossible to install the improvements to our lots without also installing the improvements to all lots."

(R. 35-36).

5. D.A. DID NOT RELY TO ITS DETRIMENT UPON ANY ALLEGED REQUEST FOR IMPROVEMENTS MADE BY PEADEN

Even had some representation been made that Peaden would share in D.A.'s development costs (which it was not), D.A. could not have relied upon that representation to its detriment. Indeed, D.A.'s president has testified that Peaden did not agree or represent that he would pay for improvements and that D.A. was required by Riverton City to make the improvements to the development, and that there was no way of separating the improvements between lots. Thus, D.A. elected to go forward with the improvements knowing that other lots owners did not agree therewith.

6. JUSTICE DOES NOT REQUIRE PEADEN TO PAY MONEY TO D.A.

D.A. made the improvements to the Foothill Development knowing that the Peaden did not agree to pay for any portion thereof. D.A., as a developer, purchased most of the lots in a development and thereafter made improvements to the Development for its own benefit and profit. The work benefited all of D.A.'s 400 lots because it allowed D.A. to obtain building permits from Riverton City to move forward with its development plans. D.A. is now seeking recovery from Peaden simply to increase its profitability on the project which D.A. undertook for its own financial interest and benefit. It would be a miscarriage of justice and an attack on public policy for this Court to allow a large commercial developer to recover from a private senior citizen under the facts of this case.

POINT VI

THE APPLICABLE STATUTE OF LIMITATIONS BARS D.A.'S CLAIMS FOR IMPROVEMENTS MADE TO LOTS 320, 322 AND 334

D.A.'s claims are barred by the statute of limitations. The four-year statute of limitations in UTAH CODE ANN. § 78-12-25 applies to all claims in equity. The statute provides, in relevant part, as follows:

> **78-12-25. Within four years.**
>
> An action may be brought within four years:
>
> (1) upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last payment is received.
>
> . . .
>
> (3) **for relief not otherwise provided for by law.**[4]

UTAH CODE ANN. § 78-12-25(emphasis added).

Based upon the foregoing, any claim for unjust enrichment or *quantum meruit* for the alleged improvements had to be brought, if at all, within four years after the alleged improvements were made. However, D.A.'s complaint was not filed until March 2002 which was **after** the four-year period expired. Therefore, D.A. could not have asserted a claim against Peaden for incidental improvements made before March 1998. As such, D.A.'s claims for relief based upon improvements made directly or indirectly to Peaden's

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[4] The four-year limitation prescribed by sub-section (3) was the proper limitation period applicable in action by subdividers for fees paid under a municipal ordinance. *American Tierra Corp. v. City of W. Jordan*, 840 P.2d 757 (Utah 1992).

lots 320, 322 and 332 in 1997 were untimely and properly dismissed by the District Court.

The improvements made directly or indirectly to lots 320, 322 and 334 of Foothills Plat "B" Subdivision were also made in 1997. Indeed, a certified copy of the *Pre-Building Permit Report*, reflects the subject improvements were completed in 1997. (R. 30). In addition, the *Notice of Interest*, which was prepared by D.A. and recorded with the Salt Lake County Recorder on January 10, 1997, reflects unambiguously on its face that D.A. was reattempting to assert an interest or claim against Peaden's properties for improvements it had made to numerous properties.[5] (R.28).

D.A. argues that even though the *Notice of Interest* was recorded on January 10, 1997, the improvements reflected in the *Notice* related to future work. However, the *Notice of Interest* reflects unambiguously on its face that D.A. was attempting to assert a present claim for improvements that had been made. The *Notice* provides, in part, as follows:

> The undersigned, Development Associates, Inc., hereby claims and asserts an interest in subject property pursuant to their improvements and developments which benefit the following described property.

(R. 28). Because the *Notice of Interest* was recorded on January 10, 1997 and because D.A. did not file the present action until March 8, 2002, all improvements referred to in

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[5] The *Notice of Interest* filed by the D.A. is unlawful because Utah law does not provide for the filing of a notice of interest in an effort to recover for improvements made to property. Indeed, the proper procedure for asserting a lien for improvements to real property is set forth in UTAH CODE ANN. § 38-1-1. Notwithstanding, D.A.'s *Notice of Interest* conclusively reflects the D.A.'s public representation as to when the alleged improvements were made.

the *Notice of Interest* and any other improvements made to Peaden's lots before March 8, 1998, were barred by the four year statute of limitations as a matter of law.

POINT VII

THE APPLICABLE STATUTE OF LIMITATIONS ALSO BARS ANY CLAIMS FOR IMPROVEMENTS MADE TO LOTS 379 AND 555

The applicable statute of limitations also bars D.A.'s claims for improvements made, directly or indirectly, to lots 379 and 555 because both lots are identified in the *Notice of Interest*, paragraph 3, which asserted a claim for such improvements in 1997. (R. 28). As such, any claim by D.A. for improvements made to those lots in 1997 were barred by the four-year statute of limitations under UTAH CODE ANN. § 78-12-25 as a matter of law before D.A. filed its complaint on March 8, 2002.

POINT VIII

THERE IS NO ENFORCEABLE CONTRACT CLAIM

1. ANY CLAIM FOR AN IMPLIED CONTRACT IS ALSO BARRED BY THE FOUR-YEAR STATUTE OF LIMITATIONS

An oral or implied-in-fact contract is subject to the four-year statute of limitations set forth in UTAH CODE ANN. § 78-12-25. The statute states that an action upon a contract, obligation, or liability not founded upon an instrument in writing . . . must be brought within four years. *Id.* Because D.A. made the alleged improvements to Peaden's properties in 1997, a claim upon any such alleged contract must have been brought within four years. Therefore, even had an implied contract existed between the parties, the time for

asserting a claim based thereon is barred by the applicable statute of limitations. Therefore, D.A.'s claim based upon an oral or implied-in-fact contract was untimely as matter of law.[6]

2. THERE IS NO FACTUAL BASIS FOR AN IMPLIED-IN-FACT CONTRACT

Even if the statute of limitations for enforcing an implied-in-fact contract had not expired (which it had), there is no factual basis to sustain an implied-in-fact contract claim. Under Utah law, the elements needed to establish an implied-in-fact contract are: (1) Peaden requested D.A. to perform the work; (2) D.A. expected Peaden to compensate it for the work requested; and (3) Peaden knew or should have known that D.A. expected compensation for such work. *See Davies v. Olson*, 746 P.2d 264 (Utah Ct. App. 1987).

None of the foregoing elements is satisfied in this case. First, Peaden did not request that the work be done.

Second, D.A.'s president, Steven R. Young, testifies in his affidavit that there was no agreement reached with Peaden. He testifies that:

> Riverton City required us to install improvements in the entire subdivisions to their current standards (as opposed to the standards in place when the subdivision was approved and recorded). Before doing so, we tried to contact all of the owners of the other lots to either purchase their lots or obtain their agreement to participate in the costs of the improvements. **All of the other owners**, either before or after the improvements were completed, acknowledged the benefit to them of the improvements and agreed either to

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[6] In this action, D.A. asserts unequivocally in Point V of its brief below that "the elements of an implied-in-fact contract are present here". (R. 42). Because D.A. contends that such a contract existed, no claim for unjust enrichment may be brought as a matter of law. *See Mann v. American Western Life Ins. Co.*, 586 P.2d 461, 465 (Utah 1978) ("Recovery in quasi contract is not available where there is an express contract covering the subject matter of the litigation"); *American Towers Owners Association, Inc. v. CCI Mechanical Inc.*, 930 P.2d 1182 (Utah 1996).

sell their lots or to participate in the costs on a prorata basis **except for the owners of eight lots, including those owned by Peaden Gene Peaden**.

(R. 35-36) (emphasis added). The foregoing testimony makes it clear that Peaden did not agree to pay for the development costs incurred by D.A.. As such, D.A. could have not been led to believe that there was an implied-in-fact contract made between the parties as a matter of law.

Third, D.A. could not have expected Peaden to compensate it without some agreement to do so, and Peaden did not know, nor should he have expected, an obligation to compensate D.A. for work performed by D.A. for its own purposes so it could promptly obtain building permits from Riverton City. (R. 2). This is especially true where D.A. did the work without Peaden's consent, participation or involvement therein.

POINT IX

D.A.'S CLAIMS ARE BARRED BY DOCTRINES OF LACHES, UNCLEAN HANDS AND EQUITABLE ESTOPPEL

A party seeking equity must do so with clean hands. *See LHIW, Inc. v. DeLorean*, 753 P.2d 961, 963 (Utah 1988).; *Salt Lake County v. Kartchner*, 552 P.2d 136, 139 (Utah 1976); *Jacobson v. Jacobson*, 557 P.2d 156, 158 (Utah 1976). The doctrine has been described as follows:

> No maxim of equity is older or more venerated than 'He who seeks redress in a court of equity must come with clean hands.' The very foundation of equity is good conscience, and any conduct in connection with the matter in controversy, which does not comport with good conscience, should preclude any relief being granted to [petitioner]. ... Misconduct which will bar relief in a court of equity need not necessarily be of such nature as to be punishable as crime or to constitute the basis of legal action. **Under this maxim, any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by**

honest and fair-minded men, will be sufficient to make the hands of the applicant unclean.'"

Dowse v. Kammerman, 246 P.2d 881, 885 (Utah 1952) (Crockett, J., dissenting) (emphasis added).

In the present case, D.A.'s president testifies that D.A. did not commence its development activities to sub-division C until November of 1997. (R. 35).

Assuming that the foregoing testimony is true, D.A. had not commenced any development of sub-division C until November 1997. Nevertheless, D.A. recorded a *Notice of Interest* asserting a present claim for such improvements in January of 1997. (R. 28). Thus, the *Notice of Interest* was a wrongful lien which the D.A. knew was wrongful at the time it was recorded with the Salt Lake County Recorder. Thus, D.A. does not have clean hands and is therefore precluded from asserting a claim for unjust enrichment as a matter of law.[7]

POINT X

D.A. FAILED TO COMPLY WITH UTAH LAW FOR THE RECOVERY OF IMPROVEMENTS MADE TO LAND

The Utah Mechanic's Lien Statute, UTAH CODE ANN. § 38-1-1, *et seq.*, sets forth the procedure by which a person may file a notice of lien so he can recover for improvements made to real property. However, D.A. did not comply with the foregoing Act.

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[7] D.A. is in a no win situation. If it alleges that the incidental improvements were made at the time it recorded its improper *Notice of Interest* on January 10, 1997 against Peaden's Property, then the four-year statute of limitations bars its alleged claims. Conversely, if D.A. alleges that the alleged improvements were made in 1997, then the *Notice of Interest*, (which is not authorized by law) is clearly a malicious slander of title

D.A. does not dispute that the Utah mechanic's lien statute sets forth the proper procedure by which a person may record a notice of lien to recover for improvements made to land. D.A. also does not dispute that it did not record a notice of lien under Utah Mechanic's Lien Statute. Instead, D.A. contends that the Act is inapplicable to its claim. However, what D.A. fails to recognize is that under Utah law a person may only record a notice of interest if it is allowed by law. Utah law defines a "wrongful lien" as:

> any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:
>
> (a) expressly authorized by this chapter or another state or statutes; or
>
> (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or
>
> (c) signed by or authorized pursuant to a document signed by the owner of the real property.

UTAH CODE ANN. § 38-9-1 (1997).

The facts are undisputed that there is no statute which authorized the recording of the *Notice of Interest* against Peaden's Property. The facts are undisputed that no judgment or order was ever entered which authorized D.A. to record a notice of interest against Peaden's Property, and the facts are not disputed that the Peaden never signed a document which allowed D.A. to record its *Notice of Interest* against Peaden's Property. D.A. also admitted that it did not record its *Notice of Interest* under the Mechanics' Lien Act, and D.A. has not asserted any other statutory basis authorizing the *Notice of Interest*. Therefore, the *Notice of*

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to Peaden's Property. Under either scenario, D.A.'s alleged claim fails as a matter of law.

Interest was a wrongful lien as a matter of law thereby precluding D.A.'s right to assert a claim in equity against Peaden or his Property as a matter of law.

POINT XI

THE DISTRICT COURT'S FINDING OF GOOD CAUSE IS CLEARLY SUPPORTED BY THE RECORD

There facts are sufficiently clear to support the District Court's finding of "good cause" for the dismissal of the action. Indeed, the following fully support the District Court's ruling:

(a) The allegations made in the complaint (which were presumed true);

(b) The Affidavit of D.A.'s president, Steven R. Young, which sustains the facts set forth above in the analysis of facts;

(c) The certified copy of *Notice of Interest*, made and recorded by the D.A. on January 10, 1997, and the statements and representations made therein;

(d) The certified copy of Pre-Building Report prepared by Riverton City;

(e) The facts represented by the D.A. in its pleadings; and

(f) The representations of facts made by D.A. at the hearings before the Court.

POINT XII

THE EXTRINSIC DOCUMENTS WERE PROPERLY CONSIDERED BY THE COURT

D.A. cites two Utah cases (*i.e., Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991) and *Russell v. Standard Corp.*, 898 P.2d 263, 264 (Utah 1995)) and argues that once the District Court decides to consider outside materials, the non-moving party should be given an opportunity to respond to those materials. In this case the outside materials consisted of D.A.'s own affidavit, a certified copy of its own *Notice of Interest*

and a certified copy of Riverton City's Pre-Building Report. No other outside materials were considered by the District Court. The District Court's consideration of these documents was indeed proper and D.A.'s objection thereto is unfounded.

POINT XIII

THERE IS NO BASIS FOR RELIEF FROM JUDGMENT UNDER RULE 60(b)

There is no basis for relief from the District Court's order under Rule 60(b) of the *Utah Rules of Civil Procedure*. For the reasons stated above, this Court's decision was based upon the merits of the case, and not upon a two-day delay in the filing of a response to Peaden's alternative motion for a more definite statement, which became moot once the District Court granted Peaden's motion to dismiss. Moreover, even if the District Court should have considered the untimely pleading filed by D.A., its failure to do so is simply "harmless error". Utah R. Civ. P. 61[8] requires the District Court to disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Based upon the foregoing, D.A.'s memorandum in opposition to Peaden's alternative motion for more definite statement became meaningless after the District Court granted Peaden's motion to dismiss, and was properly disregarded by the District Court.

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[8] **Rule 61. Harmless error.** No error . . . or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding **must** disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

POINT XIV

THE DISTRICT COURT PROPERLY TREATED THE MOTION AS ONE FOR SUMMARY JUDGMENT

The District Court did not abuse its discretion in considering matters outside the pleadings. UTAH R. CIV. P. 12(b) provides in relevant part as follows:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In this action, the District did receive and consider the Affidavit of Steven R. Young, which D.A. had filed with the Court in opposition to Peaden's motion. The only other outside materials considered were D.A.'s *Notice of Interest* recorded January 10, 1997 and a certified copy of the *Pre-Building Report* from Riverton City. Surely, D.A. cannot complain that the Court acted improperly by receiving D.A.'s Affidavit and D.A.'s own *Notice of Interest* which it recorded with the County Recorder.

POINT XV

D.A.'s AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR RELIEF

On April 25, 2002, D.A. filed a motion for leave to file an amended complaint, (R. 49), together with the proposed amended complaint. (R. 51-55). While the proposed amended complaint did not add any new allegations, it alleged the following additional claim "[p]laintiff is entitled to have an equitable lien impressed upon the lots owned by defendants to secure payment of the amounts due plaintiff hereunder." (R. 54).

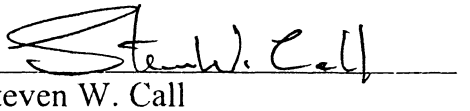
The adding of the foregoing sentence to the original complaint does not preclude dismissal based upon the ruling of the District Court. The allegations set forth in the amended complaint do not state a timely claim for an "equitable lien" under Utah law. In addition, the same four-year statute of limitations bars any claim of an alleged equitable lien. *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757, 760 (Utah 1992).

CONCLUSION

For the foregoing reasons the District Court's order dismissing D.A.'s complaint should be affirmed as a matter of law.

DATED this 23rd day of February, 2004.

RAY QUINNEY & NEBEKER

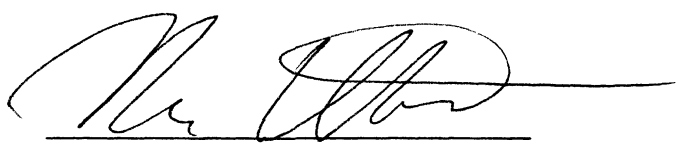


Steven W. Call
Benjamin J. Kotter
Attorneys for Appellee Gene Peaden

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF THE APPELLEE was mailed, postage prepaid, on this 23rd day of February, 2004 to the following:

Ralph J. Marsh
800 McIntyre Building
68 South Main Street
Salt Lake City, Utah 84101



745818v8

Hearing Transcript
(Motion)

IN THE THIRD JUDICIAL DISTRICT COURT

STATE OF UTAH

* * * * *

DEVELOPMENT ASSOCIATES, INC., * COPY

Plaintiff, * HEARING

vs. * Case No. 020902121

GENE PEADEN, *

Defendant. *

* * * * *

BE IT REMEMBERED that on the 23rd day of September, 2002, commencing at the hour of 10:30 a.m., the Hearing in the above-entitled matter was held at the above-entitled Court, Salt Lake City, Utah. This Hearing was electronically recorded.

A P P E A R A N C E S

For the Plaintiff: RALPH J. MARSH
Attorney at Law
68 South Main #800
Salt Lake City, UT 84101

For the Defendant: STEVEN W. CALL
Attorney at Law
P.O. Box 45385
Salt Lake City, UT 84145

Judge: WILLIAM B. BOHLING

* * * *

P R O C E E D I N G S

THE COURT: This is Case No. 020902121. Counsel, would you enter your appearances, please?

MR. MARSH: Ralph Marsh for the Plaintiff.

MR. CALL: Steven Call on behalf of the Defendant, Gene Peaden, Your Honor.

THE COURT: I'll hear your motion, Counsel.

MR. CALL: Thank you -- Thank you, Your Honor.

MR. MARSH: Well, it's my motion.

MR. CALL: I believe that's correct, the Court has dismissed and it's a Motion for Reconsideration, so --

THE COURT: Oh, all right. Go ahead, Counsel.

MR. MARSH: Thank you. It's not correctly entitled a Motion for Reconsideration, it is a Motion, under Rules 52, 59 and 60, however, to Amend or to Amend the Judgment and so on.

A quick review of the facts, if I may, Your Honor. We filed, on behalf of Development Associates, a complaint alleging basically a cause of action for unjust enrichment. And Mr. Call filed, on behalf of his client, a Motion to Dismiss, attaching two documents outside of the complaint to his motion.

The time, as I calculated under Rule, when a response to his Motion to Dismiss was due from me was

April 25th. On that day I served on him our response to that motion.

And I did not recall, until I received the Court's order, whether I had mailed the original to the Court or actually delivered it. As it turns out, as I checked later, I must have mailed it, because the original did not reach the Court until I believe the 29th.

I -- It was due on Thursday, the 25th, I mailed it that day apparently, and it reached the Court in time to be entered in the Court file the next Monday. So, by that reckoning, it would have been two days late, that is a Friday and Monday.

Mr. Call's secretary called me on May 14th and requested an extension of time to file their reply to my -- my memo in opposition until Monday the 20th, and I granted that extension.

And it didn't come on the 20th, but on the 21st she called again and requested another extension until the 25th of May, which I granted, which is my practice, whatever they need I usually grant.

And their response -- their reply, however, was not filed on the 25th, it was actually filed on the 30th of May. So it was late, but that didn't bother me.

On June 14th Mr. Call filed a Notice to Submit for Decision, indicating that both parties had requested oral argument in this matter and referencing all of the documents that had been filed, his motion, my response and his reply.

On June 26th the Court signed a minute entry decision and order which states, before the Court is Notice to Submit Defendant's Motion to Dismiss dated April 8th, 2002 and Defendant's alternative Motion for Definite Statement filed May 30, 2002 and submitted on its June 14, 2002 Notice to Submit for Decision.

Having reviewed all pertinent pleadings and having no timely opposition being filed and good files appearing, the Motion to Dismiss is granted. This constitutes the order of the Court.

THE COURT: Counsel, just so we can get right to the heart of where we're at today, I see this as a motion on the merits.

I'm not going to hold you to the problem, that, as a matter of fact, there -- there seem to have been other incidences where someone is late, and I'll get -- I'll get submitted to me on no response an opportunity to rule on it, and I simply do that.

But if it turns out there's -- that there are a couple of days delay and everybody has filed their

items, I routinely just vacate that and hear the matter on the merits. And so that's where we're at today.

MR. MARSH: Okay. I'm --

THE COURT: I'm not going to hold you to the fact that you were a couple days late, it certainly isn't something that I think the other side is seeking to take advantage of. I'm willing to just hear this matter on its merits.

MR. MARSH: I was going to suggest that if that's the Court position this becomes -- or rather it becomes more complex than it would if it was simply a dismissal for a two day untimely filing. That would make this a very simple matter.

THE COURT: It would. And if you're prepared to proceed on the merits, the Court is as well. On the other hand, if you -- if you are unprepared and just want to set this again, it's up to you, Mr. Marsh.

MR. MARSH: On the merits, are you speaking of the merits on our Motion to Dismiss?

THE COURT: Yes.

MR. MARSH: On their Motion to Dismiss?

THE COURT: Yes.

MR. MARSH: That was not noticed for today, and I did not submit courtesy copies of those documents to the Court, nor did I actually prepare for that

motion, I was simply prepared to address our motion to set that aside.

THE COURT: All right. I don't even think you're opposing that; are you, Counsel?

MR. CALL: We had opposed it, and we did submit courtesy copies on the merits, and I -- I -- I do think that this was -- the substance of the issues were addressed in the memorandum in opposition to Motion to Vacate.

We addressed -- We stated in our opposition to his Motion to Vacate that we weren't objecting to any of the timeliness issues, but that we address specifically the merits of the Court's ruling.

So I guess it would be my position that the merits are before the Court today, because that was -- the only response that we made to his motion was we agreed everything is timely, but we -- we agreed that the Court can look at the merits and that there's no basis for a claim.

THE COURT: Well, is it -- there has been this issue, and, frankly, I wanted to recognize that I understand Mr. Marsh's position here, and if you would be more comfortable rescheduling, fine, if you want to go to the merits, I'm prepared and I think Counsel is.

MR. MARSH: Well, I believe I can go to the

merits of the motion, in which case that would be Mr. Call's motion, and he should address it first I suppose.

MR. CALL: All right.

THE COURT: That's fine. But, again, it's really your decision, Mr. Marsh.

MR. MARSH: Well, I appreciate that, and does that clarify things for me, and it means I have merits to discuss and not -- not the timeliness issue.

THE COURT: All right.

MR. CALL: Giving a little factual background I think is appropriate. This is a lawsuit that the Plaintiff, Development Associates, has filed against the Peadens.

The Peadens owned six lots in a development, a rather large development in Riverton City. Originally, the developer was a company by the name of Bagley Development.

Bagley had gone to Riverton City, had undertaken this development, had posted the appropriate bond to comply with the development process, and in that process sold six lots to the Peadens.

After the lots were sold, the developer, Bagley, apparently became in financial woes and borrowed some money in order to tender the property

taxes owing on these hundreds of lots to the County.

Money was borrowed from Mortgage Investment, Inc., and, thereafter, Bagley defaulted on the money that it borrowed to pay the taxes. And the property went into foreclosure and was purchased by the lender, Mortgage Investment, Inc.

Thereafter, the property was conveyed to the Plaintiff in this action, Development Associates. For whatever reason, the bond that had been pledged for the development was lost or became unenforceable, and so this development remained in its state at that period of time.

Sometime thereafter, after Development Associates purchased this property, which we believe was for a very nominal sum, there were some conversations that occurred between the President of the company and the Peadens.

And the President of Development Associates, as represented in his affidavit, indicated that he had contacted many of the lot owners and had inquired whether they were willing to immediately assist with the development cost that the Plaintiff wanted to undertake in its own designs and fashions. And except for approximately eight different lot owners, some of them agreed to participate to a certain extent.

The Peadens indicated that no, this isn't a good time for us, we're not interested in developing the lots immediately, we weren't required to do that, we're holding these lots for our own purpose, and made it clear that they were not willing to participate with the developer in making further developments to the development itself.

After that occurred, the Plaintiff attempted to move forward with some development and Riverton City explained to them, you can't do that, we're not going to let you come in here.

And the Plaintiff, I believe the record reflects, owns approximately 400 of the 556 lots, went to Riverton City attempting to get building permits and other permits to move forward with the development of their lots.

Riverton City responded and said, no, you can't do that, you can't do that, we're not going to allow you to move forward on a partial basis, you're going to have to make these improvements in order to move forward.

The Plaintiff, obviously, because in acquiring this property in a foreclosure type method, had intended to move forward at that time, knew the circumstances when it got involved with the property,

went forward with some development of the property, and dealt with Riverton City in order to obtain the necessary permits.

In obtaining the permits, the Plaintiff proceeded to make improvements on the development. After many of the improvements had been made, and there are three primary plats that were involved, three of Mr. Peaden's lots were in Plat B, three were in Plat C.

They undertook Plat -- the development of Plat B first, made some improvements to that plat, and then also undertook some heavier development in Plat C. In 1993, before the developments occurred, Mr. Peaden had sold one of his lots or conveyed one of his lots to his son. So, long before the developments occurred, he only then held five lots, three in Plat B and two in Plat C.

The Plaintiff moved forward with the development, Your Honor, and after the improvements were substantially completed in Plat B, the Plaintiff then went to the County Recorder and filed a formal Notice of Claim -- or Notice of Interest on all of the Peaden's property.

The Notice of Interest, which is attached as Exhibit B, states, that the undersigned, Development Associates, hereby claims and asserts an interest in

subject property pursuant to their improvements and developments, which benefit the following described property.

And they proceed to list all of the lots in the three plats. That was recorded with the Salt Lake County Recorder on January the 10th, 1997. We believe, and we've attached for the Court a copy of that, and I think it's unambiguous that that is a present claim that has been asserted, or a Notice of Interest that has been asserted with respect to that property.

It is our position, Your Honor, that that claim constituted the triggering point for the statutes of limitations with respect to the claims that have been asserted by Development Associates.

In its complaint, Development Associates asserts that it is entitled to recover from the Peadens primarily on two claims for relief; one, that there must have been an implied contract between the parties that the Peadens would pay for a portion of the development, thus, an implied in contract claim -- implied in fact claim, even though it's undisputed between the parties that there -- that there was no written agreement or oral agreement between the parties, there is a claim stated in the complaint that there was an implied in fact contract, which led up to

the filing of the Notice of Claim that was filed in January of 1997.

The second claim for relief is that the Plaintiff is asserting that it has conveyed an unjust enrichment upon the Defendants, because it undertook to do development work not on their properties specifically, though there were some stubs that were put on their lots, we're talking about improvements that are made to the development, and that is the sewer, the water, the fire, the grading of the roads and what have you.

With respect to both of those claims, Your Honor, we have asserted that they are both barred by the applicable statute of limitations.

Title 78, Section -- Chapter 12, Section 25 states that an action to be brought upon a contract that is not founded in writing or brought another claim that's based upon an oral assertion, must be brought within four years.

In this circumstance the claim that was asserted was that the parties have been unjustly enriched. The Utah Supreme Court has held that the unjust enrichment claim is a four year claim governed by that applicable statute of limitations. The action in this case was not filed until March of this year.

Thus, the claim that was asserted, which was filed in January of 1997, was more than five years old before the action in this case was brought. Thus, it's the Peaden's position, without even reaching the substance of the claim itself, that it is barred by the statute of limitations.

Secondly, with respect to the lot -- the improvements that were made in Lots 379 and 555, which were the two lots in Plat C, we are also asserting that those are barred by the statute of limitations, because those lots were also included in the formal claim that was asserted and recorded with the County Recorder.

Again, the argument is, Your Honor, that if there is a significant claim that exists, such that the Plaintiffs were -- the Plaintiff was entitled to file such a claim with the County Recorder, then surely its claim would have accrued at that time.

It's undisputed that the Peadens have never made any payments to the Plaintiff under any sort of contract or under any sort of claim in equity. They have always rejected and refuted any sort of assertion that they were obligated to make any such payment.

As such, if the Plaintiff was seeking to sue in equity or on an implied in fact contract, it must have done so before January 10th of 2001.

Indeed, even if we admit that there is an implied in fact contract that existed before the claim was filed with the County Recorder, thereby justifying the filing of the claim, that would also establish a triggering date before January 10th, 1997, thereby requiring any cause of action to be brought on or before January 10th of the year 2001.

Again, the complaint that was filed in this action by the Plaintiff wasn't filed not in January of 2001, nor in January of 2002, but in March of 2002. And, therefore, any claim, based upon an implied in fact contract, is also barred by the statute of limitations.

In the original complaint that was filed, it was suggested that there were some basis for an implied in fact contract, that the Peadens had implied that they would make payment for some of these improvements.

However, later on the President of the company, Mr. Steve Young, filed his sworn affidavit. And in that sworn affidavit, he makes it absolutely clear that there was no such agreement.

He states, in paragraph 6 of his affidavit, that -- and I'd like to read this, if I could, "Riverton City required us to install improvements in the entire subdivisions to their current standards --

opposed to the standards in place when the subdivision was approved and recorded.

Before doing so, we tried to contact all of the owners of the other lots to either purchase their lots or obtain their agreements to participate in the costs of the improvements.

All of the other owners, either before or after the improvements were completed, acknowledged the benefit to them of the improvements and agreed either to sell their lots or to participate in the cause on a prorata basis, except for the owners of the eight lots, including those owned by Defendant Peaden." So he clarifies that they never agreed to such a circumstance.

Because of that, we don't believe that there are even facts that would sustain an implied in fact contract even had the statute of limitations not run on January 10th, 1997.

And we do that, not based upon Mr. Peaden's affidavit, which, if called to testify, would testify as Mr. Young has testified, that they had no agreement or understanding between them with respect to that.

In fact, Mr. Peaden expressly rejected the suggestion that he participate. Mr. Peaden was somewhat offended, Your Honor, that someone would come

to him and say, you either sell your lot to us for $3,000 or we're going to make the improvements and sue you.

That doesn't seem appropriate. It seems to me that if you buy a lot and you hold it as an investment, that you shouldn't be held at ransom to conform with the demands of a majority lot owner simply because he has a separate timetable and desires to make his improvements before yours are made.

As this Court knows, there is a statutory scheme set forth in Title 38 that sets forth a matter in which a person or a company that makes improvements to real property may assert a claim.

It's the mechanic's lien statute, it deals with the rights of owners or subcontractors who improve property, it sets out a specific manner in which a notice of lien is recorded with the County Recorder, it sets forth specific statutes of limitations and rights of the property owner and the subcontractor that provides those benefits.

That is the remedy that should be followed if a subcontractor or a person conveying a benefit to land believes that he is entitled to a lien for some amount must satisfy that statute.

The facts are undisputed that nothing was done

with respect to that statute, there was no notice of lien filed under Title 38, there has been no subcontractor's lien, there have been none of the notices filed or served, as required by that statute. There was no foreclosure action brought under that subchapter for closure within the one year period, as required by that section. And that's undisputed.

We're not to suggest that there may not be a remedy in certain circumstances for subcontractors, because that happens frequently, and I'm sure the Court has addressed some of those claims. There was no such claim brought under Title 38, and there is no basis for it.

Finally, with respect to the claim of unjust enrichment, even if the statute of limitations had not run on all of these claims, Your Honor, the law appears rather clear in Utah that a claim of unjust enrichment does not exist when a party conveys an indirect benefit on a neighbor.

And, if I may approach. Your Honor, the Utah Supreme Court has adopted the restitution -- or the restatement of restitution in Utah with respect to causes of action and equity, which would include a claim for unjust enrichment.

Part of that restitution that's been adopted

by the Supreme Court is Section 106. It addressed -- Long before any of us were upon this earth, they addressed this document when they codified the doctrine of restatement of restitution.

And they wanted to make it clear that even though in certain circumstances a party could recover a claim for unjust enrichment, that under no circumstance would a party be able to use that to coerce a third party who refuses to participate in some cost to be sued under that doctrine.

Section 106 reads; a person, who incidentally to the performance of his own duty, or to the protection or the improvement of his own things, has conferred a benefit upon another, is not, thereby, entitled to contribution.

Then it comes down and makes it absolutely clear, and makes three illustrations. Illustration one, A, the owner of land on a riverbank, reasonably fearing immediate inundation, requests his neighbor, B, to join in the building of a dike, which will preserve the land of both. B refuses.

A builds the dike, which saves both pieces of land from being flooded. Result: A is not entitled to contribution from B. Example two, A and B are adjoining landowners whose lines have been flooded by

separate seepage from a nearby swamp.

A requests B to join him in draining the swamp, B refuses. A drains the swamp, thereby drying both lines. Result: He is not entitled to contribution from B. Same facts as illustration two, except that C had contracted to keep water out of A's mine, and he drains the mine -- or drains the swamp in performance of his duty to A. Result: C is not entitled to contribution from B.

The same result occurs here, Your Honor. We have a party who purchased through a foreclosure process 400 of some 500 lots. Because of the quantity of its ownership, the City required that the Plaintiff undertake certain development, not for the Defendants, but for their own efforts.

In performing those duties, the Defendants have received an incidental benefit. And it didn't agree to pay for those, it didn't mislead the Plaintiff in any way.

And, as a result, the Plaintiff has no right or claim in unjust enrichment. It's benefits were -- It's benefits were beneficial. And the Plaintiff knew that they had rejected any suggestion that they would pay or contribute to those benefits before the improvements were ever made.

Based upon that, Your Honor, we have moved the Court to dismiss the action that has been brought against the Peadens on grounds that it's barred by the statute of limitations, that there are no facts (inaudible) implied in that contract, if there were, they were barred by the statute of limitations, that there is no claim in equity against the Peadens under these circumstances.

And, finally, Your Honor, I think you're well aware that in Courts of equity a party may never approach a Court and ask for equitable unjust enrichment or some other equitable claim unless they have clean hands.

And in this case the Plaintiff went in and intentionally filed a Notice of Interest with the County Recorder, placing (inaudible) or a lien upon all of our property.

And then later testifying, in his sworn affidavit, Mr. Young says, oh, we hadn't done anything at that time. Our improvements were made in 1998, such as to bring them within the four year statute.

I assert to the Court that even if that were true, and even if the improvements were not made until 1998, the fact that the Plaintiff went in and intentionally filed that Notice of Claim, making -

present assertion of a claim against the Peaden's property, knowing that it was false, is not clean hands, and, as such, the Plaintiff has no standing or right at this point to assert a claim in equity. And with that, Your Honor, we would pray the Court to dismiss the action.

THE COURT: Thank you, Counsel. Mr. Marsh.

MR. MARSH: I'm not quite sure how to begin with that. But, just to respond to that last point, Mr. Call is claiming that Development Associates has no clean hands in this situation.

The Court needs to understand that what Development Associates did here, and not -- that wasn't voluntarily, but because they were forced to by Salt Lake County and the City of Riverton. They brought it to develop the lots which they owned.

The County and the City of Riverton required them not to develop their own lots, but to put in the improvements that would improve all of the lots in all three of those subdivisions, 556 lots total, and 100 to 150 of those lots they did not own.

There is in the file, Your Honor, a copy of Mr. Young's affidavit, which has a copy of the plats coverage, and we've marked in yellow there the ones that were owned, and you can see there's a checkerboard

pattern.

It was impossible to go in and improve just the lots that are owned by Development Associates without also improving the neighboring lots, absolutely impossible.

In the process of improving those lots, the cost per lot turned out to be somewhere between $13,000 and $17,000 per lot, depending on the location. That's a substantial sum of money that was expended in improving lots that Development Associates did not own.

The value of those lots before Development Associates stepped in was approximately $500 per lot, and that could be established by sales of those lots at that point in time. The value of those lots today is over $50,000 per lot, only because of the improvements that Development Associates put in.

To suggest that they don't have clean hands after having handed Mr. Peaden a value of $45,000 to $50,000 per lot, I think is somewhat ridiculous.

And let me go back and talk a little about the history --

THE COURT: Well, if I understand his argument, isn't the -- isn't this conferred benefit, but the argument is that you filed a Notice of Claim before you had any -- had actually conferred any

benefit at all, whatever your legal position is on the benefit?

MR. MARSH: And that's the harm that we did here?

THE COURT: If I understood him right.

MR. MARSH: If that's what he's claiming, he has not shown any harm resulting from the filing of that Notice of Interest. And let me give a little history on that too, if I may.

And a lot of this history, you know, may be of interest of the Court and may be helpful to the Court, although it doesn't appear in the complaint, and, of course, in our Motion to Dismiss, it is the facts asserted in the complaint which are taken for truth.

Development Associates did not foreclose on these lots, they actually purchased these lots from somebody else and paid a substantial sum for them. They initially went to Salt Lake County -- Well, let me back up.

Owners of these lots, which have not been developed, have often gone to Salt Lake County and says, we want to get building permits. The County says, sorry, we can't help you, there's nothing we can do, there's no improvements out there, we will not let you build.

Well, how do we solve this problem? The County and staff people said, we don't know. Development Associates came in and said, there are 550 lots out there that people own, there must be a way to solve this problem.

Initially, they went to the County and said, can we form a special improvement district that would include all of these lots, have that district put in all of the improvements, and then have that district assess each lot for the prorata cost of those improvements.

Therefore, each owner would have had to pay, not necessarily in cash, but over -- assessments probably over a ten year period of time the cost of those improvements to reimburse the special improvement district.

The County went through a process for over a year trying to set that up, and it ultimately was determined not feasible, because the County wouldn't approve it without some pledging of other assets by Development Associates, and it was ultimately determined the cost to do that through the County would be more than it could be done privately.

So Development Associates decided, well, we

Salt Lake County. The lots, by the way, were in Salt Lake County at that point in time. And the County said, we will allow you to go ahead and improve those lots, but you must improve every one.

At that point in time, Riverton City stepped in, and because of the nearness of these lots to Riverton City, they wanted to annex this property into Riverton City, and that happened, and so Riverton City took over the process from Salt Lake County.

And Riverton City also said, you must improve all of the lots, and not just to the standards that were in place at the time these lots were first approved back in 1980, but to our current standards, which increased the cost per lot that had to be expended to improve these lots.

At that point in time, Development Associates then approached the owners of all the other lots with the proposal that we're willing to buy your lot, we will agree with you -- or have you agree with us to share some of these expenses, or let's find some other way to make it work.

And every other lot owner out of that 100 to 150 that were not owned by Development Associates, ultimately agreed to that solution, and either sold the lots to Development Associates or they agreed to

participate in the costs.

And I should say there was a prior lawsuit against one of those owners, and after that lawsuit was filed, some 30 or 40 other lot owners joined in that suit, and we ended up settling that suit by accepting payment from those other owners for a portion of their costs of development.

We're down to the part where Mr. Peaden is the only one -- I shouldn't say that. He had one lot that he conveyed to a son, and that son participated in that settlement. And so, in that sense, he was a part of that settlement. These few lots he held out of that settlement, and I'm not sure why.

The -- It is true that Mr. Peaden did not agree up front to pay the cost -- his share of the cost, but it is true that when he was contacted he acknowledged the need for those improvements to be put in, he knew that his lot was essentially worthless without them, and he encouraged Development Associates to proceed with those improvements.

Now, that's a fact which is in the complaint, it's in Mr. Young's affidavit, which must be taken as true for purposes of this motion. And that's all that is required for unjust enrichment in the state of Utah. He knows the benefit that is being conferred on him,

and he encourages them to proceed, then he is subject to a claim for unjust enrichment.

Development Associates went ahead, expended literally millions of dollars improving the lots in Subdivision A, then B, and then C. And while Mr. Call has got a restatement for his authority, there are numerous cases in the state of Utah which -- which define what constitutes unjust enrichment.

And there are some cases in the Court of Appeals which go into some detail about what constitutes unjust enrichment.

In fact, the case of Davies vs. Olson goes into great detail and says that there are two branches, and one of those branches, which they refer to as quasi contract, which, by the way, is different from implied contract, quasi contract -- the elements of a quasi contract the Court of Appeals says is, a contract implied in law are, the Defendant receive the benefit, which is true in this case, two, an appreciation or knowledge by the Defendant of that benefit, which is true in this case, he knows that his lot was improved and the value was increased by $45,000 or more, and, three, under the circumstances it would make it unjust for the Defendant to retain the benefit without paying for it.

THE COURT: Isn't there another element that the Defendant requested the Plaintiff to perform the work?

MR. MARSH: In -- In this Davis vs. Olson case, the Court of Appeals states, there are two branches of this area of the law called (inaudible). The first credential is the one I just referred to, which they call a quasi contract.

In the second branch, they say that is a contract implied in fact as opposed to a contract implied in law. And the elements there -- these are all stated on page 6 by way of our Memorandum in Opposition to the Motion to Dismiss, and that will be in the file and not a courtesy copy.

But that -- that branch of (inaudible) has elements that are, one, the Defendant requested the Plaintiff to perform the work, and I think that's what the Court has referenced here, two, the Plaintiff expected the Defendant to compensate him or her for those services, and, three, the Defendant knew or should have known that the Plaintiff expected compensation.

THE COURT: All right.

MR. MARSH: So, there are two different branches and one of them requires of the Defendant a

request that the other branch does not require.

Now, I should point out that the Utah Supreme Court, both before and after the Davies vs. Olson case in 1987, has stated the elements of (inaudible) somewhat differently.

In fact, in the most recent case, Jeffs vs. Stubbs, a 1988 case -- 1990 case, I'm sorry, and this is referred to on page 7 of our memo, the Court stated, first the facts underlined in an unjust enrichment claim are often complex and vary greatly from case to case.

Indeed, by it's very nature, the unjust enrichment doctrine developed to handle fact situations that did not fit within a particular legal standard, but which, nonetheless, merited judicial intervention.

They go on to state that the remedy of restitution is not confined to any particular circumstance or set of facts, it is rather a flexible, equitable remedy available whenever the Court finds that the Defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to make compensation for benefits received.

In other words, the Utah Supreme Court is staying with a very flexible, unfixed standard in unjust enrichment situations, meaning that we don't

have to comply necessarily with all of those elements set forth in the Court of Appeals decision.

They say a Court need not find that the Defendant intended to compensate the Plaintiff for the services rendered, only that the Plaintiff intended that the Defendant be a party to make compensation. This is because the duty to compensate for unjust enrichment is an obligation implied by law without reference to the intention of the parties, it's implied by law.

What is important is that it be shown that it was not intended or expected that the service be rendered for benefit conferred gratuitously, and that the benefit was not conferred officiously.

And then it goes on to say what is meant by gratuitously and officiousness. Officiousness means interference in the affairs of another not justified by the circumstances under which the interference takes place.

I suggest that Mr. Peaden knew that these improvements had to be done and he encouraged the Development Associates people to go ahead, that that was not officiousness for them to proceed to develop those lots and improve his lot along with the rest of the lots in those subdivisions.

THE COURT: You've alleged that in the complaint, but is there any affidavit to sustain that argument?

MR. MARSH: The fact that he --

THE COURT: He encouraged them to do it?

MR. MARSH: Yes. Mr. Young's affidavit --

THE COURT: What paragraph?

MR. MARSH: Let me find it. And I should point out the fact that it's in with the claim, and under (inaudible), it's supposed to be taken as true. But Mr. Young's affidavit, nevertheless, states --

THE COURT: I think -- I think you're both relying on matters outside of the pleadings, so it seems to me this really becomes a Motion for Summary Judgment.

MR. MARSH: Well, with respect to that item, I'm relying on the allegation in the complaint, paragraph seven, which says, Defendant acknowledged the need to install such improvements, and that such improvements would benefit him and increase the value of the lots owned by him, and encouraged and requested Plaintiff to proceed with the installation of such improvements, there our Motion to Dismiss must be taken as true.

MR. CALL: If I could just interrupt I don't

think that's what that paragraph says, I think the quote is misread.

MR. MARSH: The quote --

MR. CALL: Doing so and encouraged, there's no request in that paragraph.

MR. MARSH: I didn't say request.

MR. CALL: Said encouraged and requested.

MR. MARSH: I'm reading from paragraph seven, which one are you reading from?

MR. CALL: I'm reading paragraph seven of his affidavit that you read.

MR. MARSH: I'm -- I'm reading the complaint, I'm sorry.

MR. CALL: Oh, I thought you were citing his affidavit.

MR. MARSH: I'm reading the complaint, because that is what must be taken as the truth for purposes of the motion itself.

THE COURT: I'm wondering if -- if you file an affidavit which is inconsistent with your complaint in response to an affidavit, I'm wondering if I can rely upon that complaint or if I'm forced to rely upon your own affidavit.

MR. MARSH: What --

THE COURT: Paragraph seven in the affidavit

reads, Mr. Peaden was also contacted and acknowledged the need to install such improvements and the benefit to him by doing so, and encouraged us to proceed with the installation of such improvements. That's your affidavit; right?

MR. MARSH: That's --

THE COURT: That's --

MR. MARSH: -- Mr. Young's affidavit, but I don't believe that's inconsistent with what I just read from the complaint.

If I may read that again, Defendant acknowledged the need to install such improvements, and that such improvements would benefit him and increase the value of the lots owned by him, and encouraged -- and it does say requested -- but that he did encourage Plaintiff to proceed.

So the requested is the only difference in the affidavit and -- and the complaint. The bottom line of that is that Development Associates was not (inaudible), because they did not interfere in his affairs if they proceeded to do something which he acknowledged would be of benefit to them, which he encouraged them to go ahead and do because he knew it would benefit him.

And I was going to read from the Jeffs vs.

Stubbs case the definition of gratuitously. It says, one renders services gratuitously if at the time they were rendered there was no expectation of a return benefit, compensation or consideration. Development Associates certainly expected to be compensated for the benefit they were conferring upon Mr. Peaden.

Now, if I could jump to Mr. Call's claim of why the statute of limitation applies, because that's really the only issue before the Court, his Motion to Dismiss, because he said the statute of limitations had expired.

Ordinarily, the statute of limitations is an affirmative defense which you assert in your answer, and then you get into discovery and determine whether or not there's some facts that support that.

Rather, he attached to his motion two documents, which are matters outside the complaint, one, the Notice of Interest, which was recorded, and, second, the report from the City of Riverton.

The report from the City of Riverton applied only to Plat B, had no reference to anything in Plat C, so would not have any effect with respect to those lots. Furthermore, it stated expressly that the improvements were not complete at the time that report was issued.

In fact, Mr. Young's affidavit goes on to state the improvements were installed long after that date. And, in fact, some improvements have not yet been installed, because they need to be completed under the bond filed with the City of Riverton.

Notice of Interest, upon which Mr. Call relies most heavily, was filed at the time the improvements in Plat A were installed, and -- and they did record it against the lots in Plats A, B and C, even though they have not yet commenced the improvements in B and C.

Nowhere in that notice does it give any date as to when improvements were installed or completed. And for Mr. Call to rely upon that notice as the document which says the statute of limitations began to run on this date I think is totally improper.

That's why Mr. Young filed his affidavit saying, we were installing improvements in those plats long after that notice of interest was filed. That notice wasn't filed to state when -- the dates when improvements were installed, it was simply to put other owners on notice that they were proceeding to do work within that subdivision.

Mr. Call also argued that the mechanic's lien statute hasn't been complied with. We have made no claim under the mechanic's lien statute, haven't

attempted to make any claim under that statute.

We are simply asserting that this is a matter of unjust enrichment which requires one who has received a benefit, knew about the benefit and, under circumstances where equity requires that he pay for that benefit, to do so.

The elements of unjust enrichment are that simple. He's acknowledged the benefit to him, he knows he has lots that are worth $50,000 today, he can go sell them for that amount.

THE COURT: Well, what if -- if a person owns some lots that are there being held for investment and a developer comes in and decides, well, I'm going to develop all this, and some governmental authority tells the developer he has to do certain things in order to do the development, and so the developer, with that choice, decides to proceed, what is it that -- where's the equity that requires this person holding it for investment to accept whatever this developer decides is the developer's time table on this thing? Why is there any equity at all in that?

Your developer didn't do it to confer a benefit on him, he did it to confer a benefit on himself, it was a cost of doing business. If he -- If he had decided it was not in his interest to do it, Mr.

Peaden would have been -- his interest would have been a matter of complete and total indifference to him.

MR. MARSH: Well, the Court states that, but that simply is not true. If Mr. Peaden were to stand up and say, I did not want a lot that I could build a home on, I simply wanted a little 150 by 50 foot lot that I could put a cow on or grow some vegetables on, you know, that would be one matter.

He bought those as residential subdivision lots. And when he bought them back in 1980 or '82, he expected that improvements would be put on those lots so that he would have a buildable lot. That didn't happen.

Development Associates comes along years later and cures that problem for him. He knows that he's being benefitted, he doesn't want to sit and say, I want to keep these as agricultural lots for the rest of my life, that simply was not in his mind at all, he wanted subdivision lots.

He has come forward now to try and avoid payment of this because he knows he can sell them for $50,000 as residential lots. He could not sell them for anywhere near that without the improvements that have been installed for his benefit.

Development Associates didn't want to do that,

they were forced by the City of Riverton to do it, or you can't develop your lots, because they were tired of having people like Mr. Peaden come to them and say, I want a building permit, and having to say, no, you can't do it because there are no improvements there.

Development Associates cured the problem for all of these people, including Mr. Peaden. It just doesn't make sense to say that they stepped in and forced him to take a developed lot when that's what he wanted from the very first day he bought the lot. They've given him what he wanted, they've done what he knew had to be done, they've done what he encouraged them to do, because he knew that that would benefit him. Now, he simply doesn't want to pay for that benefit.

All we're asking for is that he does, like all of the other lot owners out there who have received that benefit, that he chip in and pay his share. That's not inequitable. In fact, equity requires that he do that. That's simply all we're asking, Your Honor.

THE COURT: Thank you, Counsel. Mr. Call.

MR. CALL: I know you're running late on time, and I will make this quick, Your Honor. It is unequivocable. Based on the numbers that Mr. Marsh has presented to the Court, it would appear to me that

Development Associates has made $14,000,000.

If they went in there and did the developments on these lots for $15,000 a lot and they own 400 of those lots and they're now worth $50,000 a piece, then they've had over $14,000 -- or $14,000,000 in profit.

As Counsel indicated to the Court, which we think is dispositive in part, and one our alternative theories is that the improvements could not be made without making the improvements.

That is -- That is what an indirect benefit is. It isn't a situation like Davies vs. Olson, which I have here, where what happened in that case, the builder came in and built four duplexes on a piece of property owned by the owner, and their land sale -- or that the agreement between them failed, and he turned and sued the owner and said, well, gee, you've got to give me something for all this work that I've done to your property. That's a completely different scenario.

In our circumstance we have an indirect benefit, which has been acknowledged, that they did it only because the City required them to do it, and they did it for their own interest.

There's no question that in a restatement of restitution that I provided to the Court it makes it clear that -- it says in example one, it says, B

refuses to pay -- or B refuses, A builds a dike and saves both pieces of land from being flooded.

The second one is it saved the other property from being drained. So the mere fact that there's a benefit conferred upon the Peadens isn't the test, the test is was did they -- were they unjustly enriched to the detriment of the Plaintiff, and that's just simply not the case.

The Plaintiff did what -- what it chose to do for its own benefit, and it's benefitted tremendously from that.

I think it would be a terrible policy for the Court to suggest that if someone in a development or a neighborhood makes some improvement to a road or to some property that they feel improves the neighbor's land, that somehow that -- that will sustain a cause of action upon that neighbor because he has received some implied benefit.

These benefits that have been asserted to the Court aren't benefits that went on their ground, these are benefits that went in the development. And there are other matters that -- benefits that Development Associates received in dealing with the City.

It's my understanding that they were given property in other things. They've done very well in

this development. But, notwithstanding that, Your Honor, the fact of the matter is is that the statute of limitations has run on that.

The claim -- Utah has a wrongful -- a wrongful lien statute, and it states that you may not file -- a wrongful lien means any document that purports to create a lien or encumbrance on an owner's interest in certain real property at the time it is recorded or filed that is not expressly authorized by this chapter, referring to Title 38, or authorized or contained in an order or judgment of a court of competent jurisdiction in the state, or signed by or authorized pursuant to a document signed by the owner of the property.

The Plaintiff didn't have a judgment that authorized the recording of such a notice of interest or lien, he didn't do it based on any statutory provision that he's referred to anywhere, because there is none, that he's acknowledged that they didn't comply with Title 38, which is the only section they could have filed such a notice of interest or lien on the property under, and it's undisputed that they didn't sign any agreement with the Defendants that would have authorized such a finding. It was (inaudible) on the title.

And this isn't a trial on the merits, we're

here dismissing the complaint, because the notice of interest was improperly filed, it was filed in January of 1997.

The report, that was provided as Exhibit C to our motion, reflects an improvement report that was done by the City with respect to the first three lots, and it was a certified copy and it was certified in script.

But it states, fire apparatus was installed on November 12th, 1997, the fire access road installed on November 12th, 1997, the all curb and gutter is installed as of November 1st, 1997, road base or asphalt installed all by November 11th, 1997.

And then underneath it it's script, all roads are based and most are asphalted, see the following map for asphalted roads. And then below it says, sewer cleared as per Annette 11/7/97.

That document makes it clear that even though it was recorded -- or that City report was prepared nearly eleven months after the notice of interest was filed, it still reflects that most of this work, with respect to that plat, was completed before the end of 1997, not 1998.

This action was filed in March of 2002. As such, all of that work is well beyond the four year

statute of limitations, even if there were a claim for unjust enrichment, which there isn't.

With respect to the doctrines of quasi contract, quasi contract is just a general term that states that in equity you can recover, if there isn't a written agreement or an oral agreement, under certain circumstances, a contract implied in fact is where the facts indicate that the parties agreed that there would be a payment, even though there is nothing in writing.

In this case, the affidavit of Mr. Young, who is the President of the company, states in paragraph six -- and I think paragraph six and seven need to be read together -- he comes in and he says, we contacted all of the owners, and we asked them to either sell them our property or to share in these costs.

And he went on and said that all of them agreed to either participate or to sell their lots except for -- and agreed to either sell their lots or participate in the cost on a prorata basis "except for the owners of eight lots, including those owned by Defendant, Gene Peaden." He testifies in his own affidavit that he didn't agree to make those payments.

So I'm hard pressed to believe that any -- there could be any factual dispute that the Peadens requested that they be made or somehow implied that

they would pay for those improvements when the President of Plaintiff's company has testified that he didn't, and certainly he didn't.

He may have said, sure, that will improve the property, but I'm not willing to do it. They did it on their own timetable, they didn't seek his approval with respect to how they did it, it was their own deal, and they did it and the statute has now run.

THE COURT: Well, what they're arguing is that your client didn't agree to pay, but he encouraged them to proceed anyway. How do you interpret --

MR. CALL: Well --

THE COURT: What is your argument about --

MR. CALL: I think in that circumstance, Your Honor --

THE COURT: I mean six says he said he wouldn't pay, seven says he encouraged them.

MR. CALL: Yeah. Mr. Peaden was also contacted and acknowledged the need to install the improvements and the benefit to him by so doing and encouraged us to proceed with the installation of such improvements.

He says, they first approached him and said, will you participate, will you agree to sell us your lot or pay for any of these expenses? No, I'm not

willing to do that. Well, we're going to go ahead with the development. And well, good, go ahead, good luck with it, you should -- if you're going to develop your property, we -- go ahead and do it, that's terrific.

But the fact of the matter is is that they did it for their own benefit. It was clear that he had -- that he had told them that he wasn't going to participate. And I think, Your Honor, I think what we're talking about is maybe equitable estoppel or misrepresentation.

In this circumstance, even if we assume that he said, I won't pay, but I encourage you to do it, there's no reasonable reliance. Why? Because the Plaintiff had to do what it had to do, it didn't rely to its detriment, it already has acknowledged that it made the improvements because it had 400 lots, and the City, as he reiterated, the City expressly told us that if we didn't do it, we couldn't develop any of our lots.

So whether he made such a statement or whether he didn't was immaterial, was not relied upon to any detriment of the Plaintiff.

Your Honor, it's clear that lot 380 is well outside the ownership of the issue here. Any claim, therefore should be barred clearly. The first three

lots were in sub -- Plat B, the records, the affidavit, the report, notice of interest all reflect that that's well beyond the four year statute of limitations.

A cause of action accrues when the Plaintiff knows that he has a claim for relief. And in this circumstance the Plaintiff came to the conclusion that it had a claim for relief against the Defendant, Peaden, in January of 1997 when it went down to the County Recorder's Office and said, the undersigned Development Associates hereby claims and asserts an interest in the subject property pursuant to their improvements and developments which benefited the described property.

Whatever the status of that development was, it had determined that it had done sufficient work and incurred sufficient contracts or whatever, that it had a right to assert a claim. And because it had a right to assert a claim as of that time, the four year statute of limitations was triggered.

There's never been a payment, he's always refuted payment, and, therefore, even under their theory the four year statute would have run based upon that claim. I don't think it requires that the improvements all be made before the claim is asserted.

The law settled with respect to claims for

relief, that when they arise that you may have continuing torts, you may have all sorts of things that are ongoing, but that doesn't mean that the claim for relief does not arise when it could have been plead.

And based on everything that I've heard today, is that the Plaintiff had made some improvements, but not necessarily completed everything, but at least felt that it was in a situation where it could assert a claim, and did, in fact, assert a claim.

With respect to the affidavit and the other records that have been submitted, we've cited in our brief, Your Honor, the Standing Associate Students of University decision, which states that the Court may consider outside materials in making its decision.

Indeed, the two documents that we attached are both public records. The one is a -- is a copy of the Notice of Interest, which was recorded with the County, the other is a -- is the report that we've been referring to.

And, Your Honor, I will indicate that there's been no objection or dispute as to the authenticity of either of those documents. I agree that if there was some dispute that they were inaccurate, that we would have to convert this to a Motion for Summary Judgment and maybe, perhaps, Mr. Young's sworn affidavit does,

in fact convert it to a summary judgment. But, from our standpoint, it makes no difference.

We think his affidavit supersedes the complaint, because he is the person who has the personal knowledge, he lays it out, he covers the very facts that are in question, and we think that that is the controlling document in this circumstance.

But, nevertheless, we still win, Your Honor, on statute limitations and on the substantive law that they have failed to state a claim for unjust enrichment, and, thus, as the Court to dismiss the action.

THE COURT: Thank you.

MR. MARSH: Your Honor, may I address two issues that were not addressed by us?

THE COURT: You may.

MR. MARSH: First of all, Mr. Call's statement about $14,000,000 profit is totally without basis and totally untrue, and requires his knowledge -- some knowledge as to what the cost --

THE COURT: I don't think it really goes to the merits of the argument.

MR. MARSH: Okay. The second issue about the wrongful lien statute was not raised earlier, that statute provides that if somebody signed a document or

recorded a document which is improper, then you need to give twenty days written notice to that party to remove that -- that document before you can claim any damages whatsoever. That has never been done.

And had they done so, we would have released those lots from the effect of that notice of interest. We did so in other cases, there were people who gave us that twenty day notice under the statute.

So, under the statute, that simply doesn't apply and did not cloud his title in such a way that it caused any damage to him whatsoever, because he didn't follow the wrongful lien statute.

THE COURT: Do you want to respond?

MR. CALL: Yeah. My rebuttal to that would be, based on that acknowledgement, Your Honor, he's saying, yeah, we filed it wrongfully and we would have removed it if somebody would have made a written request, is an acknowledgement that it was wrongful. You may not obtain equity with unclean hands.

If they knowingly and intentionally filed a wrongful lien, that's wrongful -- (Tape was turned over) -- in a summary type proceeding, much like an eviction proceeding, and expunge an unlawful (inaudible) or notice of interest or something to that.

That's a process for clearing title, but that

doesn't mean that you go out and you can record any sort of instrument against someone else's property, and that, oh, it's not wrongful unless they challenge it. That's not true. The statute allows for the clearing of title.

And if Counsel, what he's indicated is, oh, yeah, we went out and filed these and they were wrongful and we just removed them when anybody made a demand, sustains our position that they filed it knowing that it was wrongful when they filed it, and they're not entitled to any equity as a result of that.

THE COURT: All right, Counsel. The Court, in referring to Rule 12b6, refers to the language which states, to dismiss for (inaudible) claim upon which relief may be granted on matters outside of -- if on a motion asserting defense number six to dismiss for failure of the pleading, state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one (inaudible) judgment and disposed of as provided in Rule 56, all parties should be give the reasonable opportunity to present all materials made pertinent to such a motion, Rule 56.

I think that's where we're at here today on this, because there have been matters that have been

presented outside the pleadings. Are there other -- Are there other pleadings that the parties believe should be presented in order to treat this as a Rule 56 motion?

MR. CALL: No, Your Honor.

MR. MARSH: If that's where the Court is going with this, consider this as a Motion for Summary Judgment, I think the Court really needs to take a look at the cases that we cited by the Supreme Court, and suggest that, first of all, the statute of limitations is an affirmative defense which is not usually properly considered on a Motion to Dismiss, and because there are usually matters of discovery that relate to that.

For example, if this man was out of the state for any period of time during this four year period of time, that time period is not included in the statute of limitations. Discovery is required to determine whether that statute is extended because of his absence from the state.

Now, that's something we cannot get without discovery. So I would suggest that discovery is required before the Court can really make that conclusion.

THE COURT: Well, do you want to respond?

MR. CALL: Yeah, Mr. Peaden hasn't been out of

the state other than maybe a week vacation here and there. He has not -- He's been in the state since 1997.

THE COURT: Well, it seems to me that we have some aspects of this motion are properly treated as summary judgment because affidavits have been -- have come into play. And I don't think the facts that under -- underpin a Motion to Dismiss for -- on statute of limitation grounds would be included.

What seems to be clear to me are the unjust enrichment arguments, in which there have been the affidavit of Steven R. Young and that have been referenced, and seem to me to be a very much referred to by both parties.

And I think that perhaps the way the Court should -- should address the issue is -- is impart a Motion for Summary Judgment on the issues of which matters outside of the scope of the pleadings that have been addressed, and as matters within this Motion to Dismiss when there hasn't been any -- any issues referred to, and I think that that would cover the statute of limitations.

It is the Court's decision to decide this on the merits, and to me that is primarily a decision that references the doctrine of unjust enrichment, is to

grant the motion.

I -- I believe that neither party is really much in difference as to what the law is, that the standard that was quoted in the brief by Mr. Marsh, and I think there's at least a 1997 case that -- Promax Development vs. Madsen, 943 P2d 243, which -- which picks up the same language and provides that to establish a contract in (inaudible) or a quasi contract, that the Plaintiff must show, one, the Defendant receive the benefit, two, an appreciation of the knowledge by the Defendant of the benefit.

Three, under the circumstances that would make it unjust for the Defendant to retain the benefit without paying for it, as the implied in law aspect, to imply -- to establish a contract implied in fact, the Plaintiff must show, one, Defendant requested the Plaintiff to perform the work, two, the Plaintiff expected the Defendant to compensate him or her for those services, and, three, Defendant knew or should have known that the Plaintiff expected compensation.

It seems to the Court that the Steven R. Young affidavit really supersedes the pleadings in the complaint and that they state what the -- they state the facts as being asserted by the -- by the Plaintiff that are -- that are being presented to the Court to

defeat the motion.

And it seems to me that, reading paragraphs six and seven together, there isn't any question that Defendant did not request the Plaintiff to perform the work, that's something that is (inaudible) recognized in paragraph six.

And I think reading six and seven together I find nothing there to warrant the doctrine of implied contract, in fact, I would rely on the language which is referred to the Court from the restatement of restitution, but I think that's consistent with the law in the state of Utah.

It seems to me what we have here is an incidental benefit, that a developer can impose costs on a passive landowner, because in order to obtain the benefit that the developer wishes, he must -- he must perform that incidentally benefits someone else. I think that's the law here, and I think that that defeats the argument being made by the -- by the Plaintiff.

On the issue of statute of limitations, again, though I rely upon these secondarily, it seems to me that there has been a basis made to dismiss on the statute of limitation claims as well, but I take that as being secondary to what I believe to be the decision

on the merits.

On the issue of whether or not there was equity, there's certainly an argument that there was no equity on the part of the developer, but I think that's -- that's not a necessary element of the Court's decision here. Mr. Call, would you prepare an order consistent with my ruling?

MR. CALL: I will, Your Honor.

THE COURT: All right. We'll be in recess.

CERTIFICATE

STATE OF UTAH *

* ss.

County of Salt Lake *

I, MINDY L. NELSON, do hereby certify that the foregoing pages, numbered 1 through 56, contain a true and accurate transcript of the electronically recorded proceedings held in connection with Development Associates, Inc. vs. Gene Peaden held on September 23, 2002 at 10:30 a.m., and was transcribed by me to the best of my ability from the cassette tape furnished to me.

Dated this 1st day of March, 2003.

Mindy L. Nelson

Mindy L. Nelson, Transcriber

I, RENEE L. STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing transcript prepared by Mindy L. Nelson was transcribed under my supervision and direction.

Renee L. Stacy

Renee L. Stacy, CSR, RPR

My commission expires:

Notary Public
RENEE L. STACY
2242 East Summerwood Dr.
Layton, Utah 84040
My Commission Expires
November 9, 2003
State of Utah

Hearing Transcript
(Order)

IN THE THIRD JUDICIAL DISTRICT COURT

STATE OF UTAH

* * * * *

DEVELOPMENT ASSOCIATES, INC., Plaintiff, * HEARING

vs. * Case No. 020902121

GENE PEADEN, Defendant. *

* * * * *

BE IT REMEMBERED that on the 23rd day of December 2, 2002, commencing at the hour of 9:15 a.m., the Hearing in the above-entitled matter was held at the above-entitled Court, Salt Lake City, Utah. This Hearing was electronically recorded.

A P P E A R A N C E S

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Judge: WILLIAM B. BOHLING

* * * *

P R O C E E D I N G S

THE COURT: We're on record in the matter of Development Associates, Inc. vs. Gene Peaden, Case No. 020902121. Counsel, would you enter your appearances, please?

MR. CALL: Steve Call, Your Honor, on behalf of the Defendant, Gene Peaden.

MR. MARSH: Ralph Marsh for the Plaintiff, Development Associates, Inc.

THE COURT: We're here to hear some objections filed by Mr. Marsh. Mr. Marsh, we'll hear your argument.

MR. MARSH: Thank you, Your Honor. I should state that Mr. Call has revised his proposed order a couple of times, in fact, I guess three times based on some objections that I made, and many of my objections have been actually resolved.

And I understand that in preparing this order he's able to make a statement of the facts as he believes the Court found. And I've simply objected, because I think some of his statements were not quite accurate, and I just wanted to get those objections on the record.

And if the Court wants to go ahead and enter that order, that's up to the Court, but I still wanted

to make sure my objections were on the record.

THE COURT: It's really appropriate, of course.

MR. MARSH: Okay. And I think my written objections pretty well state the objection that I made. This is a Motion to Dismiss in which the Court and the parties must accept all of the allegations in the complaint as if they are true.

And, therefore, I have simply stated that those are the facts in this case, and any attempt to recite facts or to find facts is -- is not appropriate, because the facts are as stated in the complaint, and he has selected facts here and there, as he desired, to support the decision, but left out some that I think are relevant. And so that's my main objection.

But, for example, in my paragraph two I have objected to his paragraph five in which --

THE COURT: Now, let me just be sure I've got the right document, because there have been a number of these filed.

MR. MARSH: Okay.

THE COURT: There is one called Objection to Proposed Revised Order that's missing cases. Is that where we're at, or is there another one since then?

MR. MARSH: The most --

THE COURT: And then there's an Objection to Proposed Second Revised Order; is that where you're at?

MR. MARSH: That's where I'm at.

THE COURT: All right. Thank you.

MR. MARSH: And I should point out that I think Mr. Call prepared a third -- third revised order, and I --

THE COURT: Do you have a copy of that third revised order --

MR. CALL: I do.

THE COURT: -- because I don't think that's reached the file yet?

MR. CALL: I do, I do.

THE COURT: Okay.

MR. MARSH: And I did not, according to my file, file an additional objection after that third revised order, and so my objections are still based on my document entitled Objection to Proposed Second Revised Order.

He did not make all of the changes that I made, but, nevertheless, he did remove one that I thought was objectionable, and that was he had asked for some affirmative relief, which I didn't think was appropriate on a Motion to Dismiss. He's not entitled to any affirmative relief because we're the complaining

party, of course. So that -- that objection is no longer relevant.

But he simply made some statements in his findings that were not totally true, some of them based on some statements that I made before the Court in our oral argument. And, of course, they're made based on his memory of what my statements were, and I don't know that he obtained a transcript of the hearing.

And so I've simply stated -- restated in my objection what I actually said to the Court. For example, in my paragraph four, objecting to paragraph nine of the so-called undisputed facts, he stated that Plaintiff's Counsel represented to the Court at the hearing that Plaintiff would have previously removed its notice of interest against Defendant's property had such request been made, because the improvements had not been made to numerous lots at the time the notice of interest was filed.

I did not make that statement quite that way. I recited what I did state. I actually stated that notice of interest against Defendant's property would have been removed had a request to do so been made by Defendant pursuant to the wrongful lien statute, as Plaintiff had done in other cases where lot owners had requested a release of the notice of interest.

Under that wrongful lien statute, there's a provision that says you have to give a twenty day notice to the party to remove that so-called wrongful lien, and if they don't remove it in that twenty days then you have a cause of action against them. No such request was ever made about under that wrongful lien statute, and that's what I stated before the Court.

I did not ever state that the notice would have been removed because no improvements had been made to the lots. That's a statement I did not make, and yet he's included it in his findings. And so I'm just clarifying what I actually said before the Court.

In paragraph two of my objections, again, objecting to paragraph five of the proposed undisputed facts, he's referring to the affidavit of Steven Young. In fact, the affidavit does not state that the Defendant, Peaden, did not agree or represent that he would pay for the improvements.

And it further states in paragraph seven, this is quoting from the affidavit of Mr. Young, that Mr. Peaden was also contacted and acknowledged the need to install such improvements, and the benefit to him by doing so, and encouraged us to proceed with the installation of such improvements.

Furthermore, in the complaint we've alleged

that Defendant acknowledged the need to install such improvements and that such improvements would benefit him and increase the value of the lots owned by him, and encouraged and requested Plaintiff to proceed with the installation of such improvements.

All I'm saying is that that's what the complaint says, which must be taken as true for purposes of a Motion to Dismiss. And if the Court looks at the affidavit, which is unopposed, the finding must be what the affidavit states and not the way that Mr. Call has worded it with his order.

I don't know that I need to go through each one of these objections, except to state that I -- I've just made some corrections. For example, in paragraph five he refers to the notice -- or to the -- the pre-building permit report which was submitted to the Court, and then made a conclusion that -- first, that most of the improvements had been installed according to that report without changes that, in this third revised order, to many of the improvements.

And I'm simply saying, all that report says is that some improvements were made, and he cannot conclude that most of them were in or any number of them were in, because there is no reference to what was required, only that some improvements had been

installed. That's -- That's all I'm objecting to in that paragraph.

Then in my paragraph seven I'm objecting to paragraph -- well, seven and eight, I'm objecting to paragraphs 20, 21 and 22 of the proposed order in which Mr. Call makes the statement that the Court concluded that the Plaintiff is guilty of unclean hands in equity.

I wrote down in my notes, when the Court issued its order, that that was not part of the Court's decision, and so I simply make an objection based on that statement that I wrote down in my notes from the Court's ruling from the bench, unclean hands in equity is not part of the decision.

And my paragraph nine is the one which refers to the affirmative relief which he had set forth in his order, but which he has removed from his latest version of the order.

So -- And, again, my objections are made simply to put on the record my feelings that the order does not accurately recite either what the Court's ruling from the bench was or what the facts were, because the facts must be taken as true as stated in the complaint.

THE COURT: Thank you, Mr. Marsh. Mr. Call.

MR. MARSH: First, Your Honor, with respect to the facts, let me say that in drafting the order I did try to follow the Court's ruling, and the Court addressed this issue in its ruling in discussing the distinction between the allegations in the complaint and the affidavit that was filed by the Plaintiff's President.

And if I could just read from his paragraph six, because the Court included that in its ruling, he testifies -- and, again, he's the President of the Plaintiff, and we're dealing with improvements that were made, and the paragraph disputed has to do with whether or not there's something erroneous with the Court's conclusion that there was no agreement for these improvements to be made -- and he testifies, before doing so we tried to contact all of the owners of the other lots to either purchase their lots or obtain their agreement to participate in the cost of improvements.

All of the other owners, either before or after improvements were completed, acknowledged the benefit to them of the improvements and agreed either to sell their lots or to participate in the cost on a prorata basis, except for the owners of the eight lots, including those owned by Defendant Peaden

And this Court concluded, based on that affidavit, that it was clear from his testimony that, in fact, he is indicating that my client, the Defendant, did not agree to pay for those improvements, it's laid out specifically in the President's affidavit.

Counsel argued that the Court should ignore the affidavit and look solely to the complaint, and the Court addressed that, and I -- the language in the proposed order I believe reflects nearly precisely the Court's -- the spirit of the Court's ruling, and it says that, the Plaintiff filed a Motion to -- let's see -- at the hearing before the Court, the Court clarified, and Defendant's Counsel confirmed, that the issue of timeliness was not at issue, that the Court's ruling should be based on the merits of the case. Just get the record right here.

The Court has considered the sworn affidavit of Steven Young. I'm now in conclusion fifteen of the proposed third order. The Court has considered the sworn affidavit of Steven Young and other extraneous materials, and, therefore, Defendant's motion may be considered a Motion for Summary Judgment.

However, even without the consideration of the affidavit and other extraneous materials, there are

grounds which would sustain dismissal of all or part of the Plaintiff's complaint based upon the uncontested documents from the public records which were attached as exhibits to the Defendant's support memorandum, that being the statute of limitations and the undisputed fact that the notice of interest was recorded against my client's property before any of the improvements made thereto were made.

And the Court indicated that, well, whether it's a Motion to Dismiss or whether it's a Motion for Summary Judgment, the Court said, I believe that I can take into consideration the sworn affidavit that was filed by the Plaintiff's President in connection with the motions pending before the Court.

And, as such, the order states -- the Court indicated that when read together, those two paragraphs, that it is clear -- if I can find it here -- paragraph six of the sworn affidavit of Steven Young clarifies that the Defendant, Peaden, did not agree or represent to the Plaintiff that he would pay for the improvements to the development made or to be made by the Plaintiff. It's precisely what the Court ruled after considering the affidavit.

The Court addressed the issue as to the distinction of the affidavit and the complaint and said

that it could consider the affidavit, which was filed after the complaint.

With respect to the other objection that was made, Counsel represented to the Court that, yes, this notice of interest was filed before any improvements were made.

That is, in his objection of the proposed order, he stated, no, that's not exactly what I said, what I really said was we did record the interest before the improvements were made to Plats B and C, but not to Plat A.

I've revised the order to deal with that objection. All of my client's lots were in Plats B and C, so I don't really think it was extremely relevant to the issue, but I've made that change nevertheless.

I have further changed his objection to paragraph nine that stated that -- that there was some objection because he had represented that they would have removed the notice of interest had a request been made.

And, of course, the whole purpose there is he's saying, because the improvements hadn't been made at the time the notice of interest was filed, we would have removed it. I put that in the proposed order and Counsel objected and said, no, that's not exactly what

I said, what I said is if they would have made a request that it be removed under the wrongful lien statute that I would have removed it.

Well, the wrongful lien statute wasn't really enacted until after the notice of interest was filed. But I don't think it's really relevant, so I included the language that Counsel in the third revised order, so I don't see that as being any further issue.

In addition, I had indicated the Court's -- the spirit of the Court's ruling that the notice of interest shouldn't have been filed because the improvements hadn't been made, and that the appropriate method for obtaining a lien against property is through the mechanic's lien statute, which we discussed before the Court.

Counsel has indicated that there should be no affirmative relief in the order of dismissal. I don't necessarily agree that that has to be, but we can file a separate action to expunge the (inaudible) on the property if that's what he wants, I'm happy to do that.

So, rather than clutter the order, I have removed those paragraphs from the order. The revised order had indicated that the Court had concluded that that was the appropriate method for filing a notice of lien, and stated that the notice of lien, which is

still recorded against our property even after this Court's ruling, that -- that it should be removed.

Counsel has indicated no, it shouldn't be removed, the Court cannot grant affirmative relief on a Motion to Dismiss, but all you can do for summary judgment is just dismiss the Plaintiff's claims.

I don't agree with that, but I'm happy to file a separate action, we have other damages that need to be addressed. And so I have removed those provisions from the third revised amended order.

With respect to unclean hands, Your Honor, I believe that the Court ruled, as I understood the Court, the Court ruled that this was simply not an action in restitution, that there was no basis for equity.

That was the Court's primary basis for its ruling. The Court then, as an alternative, indicated that even if there were -- even if this were a claim for equity, it does appear that you're barred by the statute of limitations, because your notice of interest was filed in January of 1997, the other -- the report from the City indicates that the improvements were made sometime during that year, yet your action wasn't commenced until more than four years after the end of that 1997 period, which would have required that the

action be filed sometime before March of 1998.

So it would appear that the statute of limitations would bar your claim even if you had stated a claim in equity for unjust enrichment.

And then finally, with respect to unclean hands, the unclean hands ruling, as I understood it, and I disagree with Counsel, I guess this is the only issue that appears to be clearly disputed, is that it was my understanding that the Court acknowledged that the lien had not been rightfully recorded based on Counsel's submission, and that it had -- it did not have clean hands, having come to this Court and asked for equity having intentionally filed a notice of interest against Plats B and C, which included my client's properties, knowing that there had been no improvements made to those lots.

And in our reply memorandum we had cited that a party seeking equity must do so with clean hands. We cited two Supreme Court decisions wherein the Supreme Court stated that the doctrine has been described as follows: Under this maximum any willful act in regard to the matter in litigation which would be condemned or pronounced wrongful by the honest and fair-minded men will be sufficient to make the hands of the Applicant unclean.

There is no dispute in the proceeding before this Court, based upon the pleadings and the admission of Counsel, that a notice of interest against my client's lots was filed in January of 1997. There has been a certified copy submitted to the Court.

It is undisputed that at the time that interest was recorded that there had been no improvements made against my client's properties, and, as such, it was a wrongful lien, did not comply with the mechanic's lien statute or any other statute that allows for the filing of a lien.

We asserted to the Court that was indeed unclean hands and that it did not -- the Plaintiff have a claim in unjust enrichment. The Court had already ruled they didn't have a claim in unjust enrichment. And we consider that to be a third alternative to the Court's ruling. So I believe all of that is in harmony with the Court's ruling.

We did, in attempt to conserve judicial resources and resolve this issue, I did -- I did make revisions to orders and try to get an order that was acceptable to Counsel, and I have filed and served the Defendant's third revised proposed order, I am comfortable with it, I am happy to defend it on appeal, and, as such, I would ask the Court to sign and enter

that order.

THE COURT: Counsel, the only question I have from the argument is, is there some reason why it wouldn't be helpful to treat this as the summary judgment so that that affidavit could clearly be considered?

MR. CALL: Yes. I think it should, Your Honor, and that's why I've made the specific findings. There was an objection that we had laid out findings.

Rule 54 expressly provides that the Court, on a Motion to Dismiss or on a Motion for Summary Judgment under Rule 56, may make findings and conclusions. In fact, it said -- it says it doesn't have to unless the Court makes its ruling based on alternative grants.

And, in this case, the Court did make alternative rulings, and so I think it is appropriate. So I have indicated what the Court has indicated, and that is that it's either -- if you go to paragraph one of the Order of Judgment on page seven, Defendant's Motion to Dismiss, which was converted, at least in part, to a Motion for Summary Judgment, is hereby granted.

THE COURT: Right.

MR. CALL: And that's what the Court ordered and that's -- and I tried to get the language just --

I've worked with lawyers that try to monkey with things, and that isn't the intent here, I tried to get something that reflected the Court's ruling, and I believe that I've done it at this point.

THE COURT: Thank you. Mr. Marsh?

MR. MARSH: Just a brief response, Your Honor, with respect to the equity argument. And I understand the Court can include anything it wishes in its order, but I'm simply quoting from my notes taken at the time that you ruled from the bench.

After it made its ruling with respect to the implied in fact contract and the statute of limitations, it said that there is no equity, it's true, but that's not part of my decision.

I wrote that down, and that's -- that was the basis for my objection to his conclusion of anything with respect to equity and unclean hands. The rest of it I submit based on my objections.

THE COURT: Thank you, Mr. Marsh. Well, Counsel, this is -- I appreciate, frankly, the scholarship of both sides in trying to refine its order. It's a complicated area.

I'm comfortable at this point, frankly, with the order that Mr. Call has prepared, and I think I'm going to overruled the objections that have been made

to it, recognizing that there has been a great deal of give and take in getting the order to the Court as stated.

So, what I'm going to do I think is simply take whiteout and remove that third revised, because that will --

MR. CALL: Oh, that would be great.

THE COURT: -- you know, that would take that away. And then that will permit me to just go ahead and enter the order now so everybody knows it's been done and we can go from there.

I've gone ahead and executed the order that was just submitted to me, the third order. And, again, appreciate Counsel's, on both sides, your very competent work in this matter. Thank you.

MR. CALL: Thank you.

THE COURT: We're in recess.

CERTIFICATE

STATE OF UTAH *

* ss.

County of Salt Lake *

I, MINDY L. NELSON, do hereby certify that the foregoing pages, numbered 1 through 20, contain a true and accurate transcript of the electronically recorded proceedings held in connection with Development Associates, Inc. vs. Gene Peaden held on December 2, 2002 at 9:15 a.m., and was transcribed by me to the best of my ability from the cassette tape furnished to me.

Dated this 4th day of March, 2003.

Mindy L. Nelson

Mindy L. Nelson, Transcriber

I, RENEE L. STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing transcript prepared by Mindy L. Nelson was transcribed under my supervision and direction.

Renee L. Stacy

Renee L. Stacy, RPR

Notary Public
RENEE L. STACY
2242 East Summerwood Dr
Layton, Utah 84040
My Commission Expires
November 9, 2003
State of Utah

My commission expires:

Rest. Of Restitution
Section 106

RESTATEMENT OF THE LAW

OF

RESTITUTION

QUASI CONTRACTS

AND

CONSTRUCTIVE TRUSTS

AS ADOPTED AND PROMULGATED

BY THE

AMERICAN LAW INSTITUTE

AT WASHINGTON, D. C.

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§ 106. Incidental Benefit to Another from Performance of One's Duty or Protection of One's Things.

A person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.

Comment:

a. Sections 76–105 deal with situations in which indemnity or contribution is granted to a person who, in the performance of his own duty or in the protection of his own interests, confers a benefit upon another. There is, however, no principle which is generally applicable by which restitution is granted to one who has been coerced by the existence of a duty or a danger to his own interests into doing an act which is beneficial to another.

Illustrations:

1. A, the owner of land on a river bank, reasonably fearing immediate inundation, requests his neighbor, B, to join him in building a dike which will preserve the land of both. B refuses. A builds a dike which saves both pieces of land from being flooded. A is not entitled to contribution from B.

2. A and B are adjoining mine owners whose mines have been flooded by seepage from a near-by swamp. A requests B to join him in the draining of the swamp. B refuses. A drains the swamp, thereby drying both mines. He is not entitled to contribution from B.

3. Same facts as in Illustration 2, except that C had contracted to keep water out of A's mine, and he drains the swamp in the performance of his duty to A. C is not entitled to contribution from B.

b. The rules as to general average, as that term is used in admiralty, are not within the scope of the Restatement of this Subject.

Utah R. CIU. P. 12(b)

UTAH RULES OF CIVIL PROCEDURE

Rule 12. Defenses and objections

* * *

(b) *How presented.* Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.